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The doctrine that a suit may be maintained by the United States against a State has, for the first time, been unequivocally decided by the Supreme Court of the United States, in the case of United States against State of Texas, which was an original proceeding in the supreme court, having for its object the determination of a disputed boundary line between the lands of the two parties. It may be said that the position of the court is a new one in constitutional law, although in the case of United States against North Carolina, where the question as to the jurisdiction of the court was not raised and nothing was said in the opinion upon that subject, the judgment could not have been rendered except upon the theory that the court had original jurisdiction of a suit by the United States against a State. In the present case, however, the court, through Mr. Justice Harlan, considers the question exhaustively upon its merits. The constitution extends the judicial power of the United States among other enumerated cases "to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens or subjects. In all cases affecting ambassadors or other public ministers and consuls, and those in which a State shall be a party, the supreme court shall have original jurisdiction. In all other cases before mentioned the supreme court shall have appellate jurisdiction" etc. The court thinks that it is apparent upon the face of these clauses that in one class of cases the jurisdiction of the courts of the union depends "on the character of the cause whoever may be the parties," and in the other on the character of the parties whatever may be the subject of controversy, and that the present suit falls in each class, for it is plainly one arising under the constitution, laws and treaties of the United States and also one in which the United States is a party. It is therefore one to which, by the express words of the constitution, the judicial power of the United States extends. The question as to the original jurisdiction of the supreme court, it will be observed, goes beyond this. And the court meets this by saying that the clause conveying original jurisdiction to all cases "in which a State shall be a party" necessarily refers to all cases mentioned in the preceding clause in which a State may be made of right a party defendant, or in which a State may of right be a party plaintiff. In the view of the court, the States of the union have agreed in the constitution that the judicial power of the United States shall extend to certain enumerated cases, among others, controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this court may exercise original jurisdiction in all such cases in "which the State shall be a party," without excluding those in which the United States may be the opposite party. The exercise therefore of such original jurisdiction in suit brought by the United States against a State to determine the boundary line between a territory and that State, so far from infringing upon the sovereignty, is with the consent of the State sued.

Beyond the interpretation of the express provisions of statute involved, the court fortified its view by declaring that they could not assume that the framers of the constitution, while extending the judicial power of the United States to controversies between two or more States of the union and between a State and foreign States, intended to exempt a State altogether from suit by the general government. They could not have overlooked the possibility that controversies, capable of judicial solution might arise between the United States and some of the States, and that the permanence of the union might be endangered if to some tribunal was not intrusted the power to determine them according to the recognized principles of law. And to what tribunal could a trust so momentous be more appropriately committed than to that which the people of the United States, in order to form a more perfect union, establish justice and insure domestic tranquility, have

constituted with authority to speak for all the people and all the States upon questions before it to which the judicial power of the nation extends?

The dissenting opinion of Chief Justice Fuller and Mr. Justice Lamar proceeds upon a strict construction of constitutional powers, but goes only to the length of declaring that the case is not within the original jurisdiction of the court.

The position taken by them is that the court has original jurisdiction only in certain cases, one of which is that wherein a State shall be party. The judicial power, they say, extends to "controversies between two or more States," "between a State and citizens of another State" and "between a State and the citizens thereof and foreign States, citizens or subjects." The original jurisdiction of the court which depends solely upon the character of the parties, is confined to the cases enumerated in which a State may be a party and this, they contend, is not one of them. It will be observed that the dissenting judges concede that the judicial power of the United States extends to controversies to which the United States shall be a party, but they believe that such controversies are not included in the grant of original jurisdiction.

As a matter of fact, however, the question of "original jurisdiction" is the vital issue in the case, for it is clear that under existing statutes a Circuit Court of the United States has not jurisdiction of a suit by the United States against a State.

NOTES OF RECENT DECISIONS.

MUNICIPAL CORPORATION — FORMATION— POWERS OF JUDICIARY.—The case of *In re* Village of Ridgefield Park, decided by the Supreme Court of New Jersey, is of interest upon the question whether the power of incorporation of municipalities belongs exclusively to the legislative authorities. The court holds that the power of deciding questions of public policy which relate to the organization and extent of municipal corporations is one properly belonging, under our constitution, to the legislative department of the government, and therefore it cannot be exercised by any person or persons belonging to or constituting either the executive or the judicial department. A justice of the supreme court cannot decide within what territory the resident voters should be permitted to assume municipal existence and authority. Dixon, J., says:

> Under an act for the formation and government of villages, approved February 23, 1891 (P. L. 1891, p. 33), a petition was presented to the justice of the supreme court holding the circuit court of the county of Bergen, praying that he take the prescribed steps for the formation of the village of Ridgefield Park, in that county. Doubting the validity of an essential provision of the act, the justice declined to do so, and application is now made to this court for a *mandamus* directing him to proceed.
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> The statute requires the petition to be accompanied by a description of the proposed boundaries of the village, and makes it the duty of the judge of the circuit court to give public notice of the boundaries, and of a time and place when and where he will hear and consider what may be said as to them by any person interested. Upon this hearing he is to determine whether the proposed boundaries are such as will be most advantageous and consistent with the public interests, in view of the character of the locality and community proposed to be incorporated, and will not unduly or unreasonably include or exclude any territory that ought not to be included or excluded; and he is to confirm, amend, or alter the boundaries as shall seem to him most consistent with public and private interests. To the legal voters within the territory thus defined by the judge is there to be submitted the question whether the proposed village shall be incorporated. If they approve, a municipality is created, with large powers of local government. The power thus to be exercised by the judge is that of determining within what territory the voters may be permitted to assume municipal existence, and such local authority as the act prescribes. In effect it devolves upon him the duty of deciding to whom such authority may properly be intrusted. This is the questionable feature of the statute. By the constitution of this State (article 3) the powers of the government are divided into three distinct departments,—the legislative, executive, and judicial; and no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others, except as in the constitution expressly provided. The constitution also (article 6) establishes the supreme court and a circuit court in every county of the State, as members of the judicial department of the government. The question now arising is, therefore, whether the power which this act attempts to confer upon the circuit judge, who is also a justice of the supreme court, is one properly belonging to the executive or legislative department; for, if it be, it cannot be exercised by such judge, who is a person belonging by force of the constitution itself to the judicial department. It seems clear that in this State the power of incorporating municipalities properly belongs to the legislative department. In England the power could be exercised by the crown alone, and by parliament; but, as the crown and the parliament each possessed powers belonging to all the departments into which our State government is divided, neither of these facts denotes the department to which the function belongs. Nor can much assistance in the effort to classify this power be derived

from any attempt to formulate definitions of executive, legislative, and judicial authority; for it must be conceded that, with reference at least to public agencies, the lines of demarkation are sometimes shadowy. But in the framing of American constitutions that which chiefly suggested and controlled the selection of their language was the practice of the governments to which the framers had been accustomed, and consequently this practice furnishes one of the safest guides in the interpretation of their words. Prior to the adoption of our State constitution in 1844, all of our municipal corporations, except a few of the most ancient towns, *e. g.*, Perth Amboy, had been created by legislative enactment, and the authority of the legislature over them had been deemed complete. The same practice and opinion prevailed throughout the United States. Says Judge Dillon (1 Mun. Corp., 3d Ed., § 9): "In general, all of our American cities, towns, and counties * * * are created by the legislature." *Id.* § 21: "Municipal corporations must, with us, be created by statute." *Id.* § 37: "The proposition which lies at the foundation of the law of corporations in this country is that here all corporations, public and private, exist, and can exist, only by virtue of express legislative enactment." It is also, I think, true that in New Jersey the boundaries of every municipality incorporated by the legislature, save one, have been defined by statute. The exception is the town of Paterson, the boundaries of which were, under the act of November 22, 1791 (Paterson's Laws, p. 104), determined by the location of the society for establishing useful manufactures, when sanctioned by the taxable inhabitants of the district. This practice likewise corresponds with common usage throughout the United States, except where by constitutional restrictions, which are all modern, the legislature is required to provide for the organization of municipalities by general laws. 1 Dill. Mun. Corp. (3d Ed.) § 183. These facts lead to the conclusion that, within the design of our constitution, the power of creating municipal corporations, including the definition of their territorial boundaries, is one properly belonging to the legislative department of the government.

It is not to be inferred from this that the legislature may not delegate portions of this authority, for there are many instances in which the creation, consolidation, and division of municipalities have been made subject to the votes of the resident electors. But such right of delegation does not militate against the idea that the power is constitutionally legislative. Being so, it cannot be exercised by a justice of the supreme court. Paul v. Gloucester Co., 50 N. J. Law, 585, 15 Atl. Rep. 272. This view is corroborated by the general trend of judicial sentiment in this country. In Powers v. Commissioners, 8 Ohio St. 285, it was adjudged that county commissioners, in deciding whether certain territory should be annexed to a municipality, were determining a question of public policy, and not exercising a judicial power in the sense in which the constitution vests in courts exclusive judicial powers. So in Shumway v. Bennett, 29 Mich. 451, the supreme court declared that the power of fixing the boundaries of municipal corporations is not judicial power; and many cases are cited to illustrate the difference between the judicial power, which pertains solely to courts, and the power of judging, which must be exercised by all functionaries. In People v. Nevada, 6 Cal. 143, it was held that county courts could not be authorized to incorporate town governments, as that was deemed, under a constitution like ours, a legislative function; and in Tennessee (State v. Armstrong, 3 Sneed, 634) it was decided, under a similar provision, that the courts could not be authorized to create corporations, or to determine whether they ought to created. In People v. Carpenter, 24 N. Y. 86, the court of appeals said: "Previous to the constitution of 1846, the erection and division of the towns in this State, and the alteration of the boundaries thereof, rested solely with the legislature, and was governed only by its discretion." The constitution of Illinois distributes the powers of government, as does ours, and there a statute was passed directing the circuit courts to determine whether territory ought to be annexed to or severed from any existing city, town, or village. A circuit court having, under this act, cut off certain territory from a city, the supreme court reversed its proceedings, saying: "Whether cities, towns, or villages shall be incorporated, and, if incorporated, whether they shall be enlarged or contracted in their boundaries, presents no question of law or fact for judicial determination. It is purely a question of policy, to be determined by the legislative department." City of Galesburg v. Hawkinson, 75 Ill. 152. Likewise, in People v. City of Riverside, 70 Cal. 461, 11 Pac. Rep. 759, it was said that the propriety of establishing a municipality, and of including within its boundaries a particular territory, is in general a political question for the legislative department of the government. The only case which I have found where the question turned upon the principle now involved, and the decision was opposed to the foregoing citations, is City of Burlington v. Leebrick, 43 Iowa, 252, in which the power of a circuit court to determine whether justice and equity required that certain territory should be annexed to a city was sustained. No reasons are assigned, the court being content to say: "We have no doubt that the questions are so far of a judicial character that they may be properly vested in the judicial department of the State." This scarcely countervails the weight of contrary decisions, reached after doubt had given rise to discussion and deliberation. The better conclusion is that the power of deciding questions of public policy, which relate to the organization and extent of municipalities, is one properly belonging to the legislative department, and therefore not exercisable by either the executive or the judicial department. The *mandamus* asked for should not issue.

CONSOLIDATION OF FOREIGN CORPORATIONS.

1. *Legislative Authority.*— The general principles controlling the consolidation of corporations, briefly stated, are: 1. That such a step must be authorized by the State; and 2. Must be with the assent of the stockholders. Since a corporation has no original power, but is dependent upon legislative enactment not only for legal existence, but for all the capacity it possesses,[1] and can do no act that does not fall within the scope of that authority, a consolidation with another com-

[1] Head v. Providence Ins. Co., 2 Cranch, 173.

pany which is not authorized by the legislature is illegal and void.[2]

2. *Consent of Stockholders Necessary.*—The consolidation must be with the unanimous consent of the stockholders of both companies. In all ordinary transactions, consistent with the purposes for which the company was authorized, the acts of a majority of the stockholders are binding on the whole. But a consolidation with another company is a fundamental change in the original purpose of the corporation, a departure from the stockholder's contract as expressed in the charter, which cannot be accomplished without his consent.[3] Where, however, as is sometimes the case, legislative authority to consolidate is contained in the charter, the stockholder will be presumed to have contemplated such a contingency in his contract of subscription and to have intended to be governed, in that as in other matters of corporate policy, by the majority of his associates. A further assent on his part is not essential.[4] The Connecticut court has even held that, when in the charter the State has expressly reserved the power of amendment, a ratifying act confirming an unauthorized consolidation must be regarded as an amendment, and would make the stockholders' assent unnecessary.[5] Such an extension of the reserved power of amendment, however, violates the inhibition of the federal constitution against impairing the obligation of contracts, and is to be supported neither upon principle nor authority. The power of amendment is reserved to the State for the benefit of the public, to be exercised by the State only, and cannot be made the means of changing the rights of the corporators between themselves.[6]

3. *Method of Consolidating Foreign Companies.*—Although the laws of a sovereignty can have no extra-territorial effect, and a corporation is entitled to no recognition beyond the limits of the State by which it was created, yet companies created by distinct sovereignties may, in several ways, be consolidated into a single corporation, having a corporate domicil in two or more States, and entitled to the privileges and incurring the liabilities of a domestic company in each. Thus a State may authorize the consolidation of a domestic company with a foreign one;[7] it may ratify such a consolidation, when made without authority,[8] or acting concurrently with the legislature of another State, it may vest the same individuals with the corporate capacity,[9] or, as more frequently happens, it may by adoption domesticate a corporation created in a foreign jurisdiction.[10]

4. *Adoption a Question of Legislative Intent.*—Whether or not the effect of certain legislation be to adopt a foreign corporation, or merely to license it to do business in the State, is a question of legislative intent, to be deduced from a proper construction of the statutes.[11] For instance, where, by a statute of Kentucky,[12] a railroad company

[2] Pearce v. Madison R. Co., 20 How. 441; Clearwater v. Meredith, 1 Wall. 25; State v. Bailey, 16 Ind. 46; Taylor v. Earle, 8 Hun, 1.

[3] Mowery v. Indiana, etc. R. Co., 4 Biss. 83; Tuttle v. Mich. Air Line R. Co., 35 Mich. 247; Clearwater v. Meredith, 1 Wall. 25; Black v. Delaware, etc. Canal Co., 24 N. J. Eq. 455; Mills v. Central R. Co., 41 N. J. Eq. 1; Taylor v. Earle, 8 Hun, 1. See also Stevens v. Rutland, etc. R. Co., 29 Vt. 445; Sparrow v. Evansville, etc. R. Co., 7 Ind. 369; McCrary v. Junction R. Co., 9 Ind. 358; Kean v. Johnson, 9 N. J. Eq. 401. *Contra:* Lauman v. Lebanon Valley R. Co., 30 Pa. St. 42, where it was held that the stockholder's right to object to the consolidation as being a departure from his contract, would entitle him to refuse to accept stock in the consolidated company for his interest, and to insist upon being paid the value thereof, but that it would not affect the validity of the new organization; that the power of a majority of the stockholders to dissolve the corporation and abandon the purpose of their creation, includes the power to merge its existence into that of another company.

[4] Bishop v. Brainerd, 28 Conn. 289. See also Nugent v. Supervisors, 19 Wall. 241; Bish v. Johnson, 21 Ind. 299.

[5] Bishop v. Brainerd, 28 Conn. 289.

[6] Zabriskie v. Hackensack, etc. R. Co., 18 N. J. Eq. 178; Black v. Delaware, etc. Canal Co., 24 N. J. Eq. 468; Mills v. Central R. Co., 41 N. J. Eq. 1. See also Dartmouth College v. Woodward, 4 Wheat. 518; Livingston v. Lynch, 4 Johns. Ch. 573; Kean v. Johnson, 9 N. J. Eq. 401.

[7] Bishop v. Brainerd, 28 Conn. 289; Graham v. Boston, etc. R. Co., 118 U. S. 161; Wilmer v. Atlanta, etc. Ry. Co., 2 Woods, 409.

[8] Quincy Bridge Co. v. Adams County, 88 Ill. 715; Bishop v. Brainerd, 28 Conn. 289; Meach v. Housatonic, etc. R. Co., 45 Conn. 199; Mitchell v. Deeds, 49 Ill. 416.

[9] Bishop v. Brainerd, 28 Conn. 289.

[10] McGregor v. Erie Ry. Co., 35 N. J. L. 115; Clark v. Barnard, 108 U. S. 436; James v. St. Louis, etc. Ry. Co., 46 Fed. Rep. 47; Uphoff v. Chicago, etc. R. Co., 5 Fed. Rep. 545; Memphis, etc. R. Co. v. Alabama, 107 U. S. 581; Copeland v. Memphis, etc. R. Co., 3 Woods, 651; Railroad Co. v. Vance, 96 U. S. 450.

[11] Uphoff v. Chicago, etc. R. Co., 5 Fed. Rep. 545; Memphis, etc. R. Co. v. Alabama, 107 U. S. 581; Copeland v. Memphis, etc. R. Co., 3 Woods, 651; James v. St. Louis, etc. R. Co., 46 Fed. Rep. 47.

[12] Act Ky. March 18, 1872, ch. 585.

was authorized to extend its road into and through that State, and the company was "declared a body-politic and corporate," and, by a subsequent act,[13] the former act and a subsequent consolidation of the company with another corporation were ratified, and the new consolidated company chartered in Kentucky, it was held, that while the first act was to be regarded as a mere license, the second act removed any possible doubt and made the company a Kentucky corporation.[14] And in Alabama a statute, authorizing a foreign railroad company to extend its road through that State, which, though not clearly expressing a purpose to bestow a corporate franchise, repeatedly used the words "the company hereby incorporated," was held to be an adoption of it.[15] Where, too, a statute passed for the purpose of recognizing and confirming the rights and title acquired by a foreign railroad company under a sale, authorized by a previous act, of the property rights and franchises of a domestic company, and which was expressed to be for "completing the organization" of the foreign company, was held to vest the latter with the character of a domestic company and render it subject to regulation as such.[16]

But a mere grant of privileges which discloses no intention to vest the company with a corporate franchise cannot be regarded as an adoption. Thus authority to a railroad company to extend its road into the State has been held insufficient,[17] although granted in broad terms by the re-enactment, in words, of the foreign charter;[18] nor will a grant of power to a railroad company to purchase and hold lands and lease a railroad, within the State, make it a domestic corporation.[19]

5. *Status of a Consolidated Company as a Domestic Corporation.*—But, however the authority to consolidate may be given, or what the particular mode of effecting the consolidation, the result is the same. The resulting corporation is, in each of the States from which it derives its powers, a domestic company alone.[20] The corporate powers derived from each sovereignty must be complete and perfect in themselves. For, although any State has plenary power to create a corporation, no two States can unite in the creation of a single company. Each State may bestow corporate capacity upon the same individuals, who will then become a domestic company of each, but no State can create part of the elements of a corporation and rely upon another State to complete it, and by this unauthorized marriage of legislative powers produce a being which has not received its full life from either.[21] Nor, to put it in another form, can two States fuse themselves into a single sovereignty and, as such, create a body politic which shall be a corporation of the two States, without being a corporation of each State, or of either State.[22] Consequently, it has been held that an interstate consolidated corporation, if we may use the expression, is a domestic company for the purposes of jurisdiction,[23] of

[13] Act Ky. March 11, 1878, ch. 395.

[14] Uphoff v. Chicago, etc. R. Co., 5 Fed. Rep. 545.

[15] Memphis, etc. R. Co. v. Alabama, 107 U. S. 581, s. c., 3 Woods, 651. See also Railroad Co. v. Vance, 96 U. S. 450.

[16] McGregor v. Erie R. Co., 35 N. J. L. 115; Clark v. Barnard, 108 U. S. 436; James v. St. Louis, etc. Ry. Co., 46 Fed. Rep. 47.

[17] Pennsylvania, etc. R. Co. v. St. Louis, etc. R. Co., 118 U. S. 290; Railroad Co. v. Harris, 12 Wall. 65; Denniston v. New York, etc. R. Co., 1 Hilt. 62; Williams v. Missouri, etc. R. Co., 3 Dill. 267.

[18] Railroad Co. v. Harris, 12 Wall. 65.

[19] State v. Delaware, etc. R. Co., 30 N. J. L. 473. See also Phillipsburgh Bank v. Lackawanna R. Co., 27 N. J. L. 206.

[20] Muller v. Dows, 94 U. S. 444; Quincy Bridge Co. v. Adams County, 88 Ill. 615; Colglazier v. Louisville, etc. R. Co., 22 Fed. Rep. 568; Allegheny County v. Cleveland, etc. R. Co., 51 Pa. St. 228, 88 Am. Dec. 519; Ohio, etc. R. Co. v. Wheeler, 1 Black, 286; Racine, etc. R. Co. v. Farmers' Loan & T. Co., 49 Ill. 331, 95 Am. Dec. 595; State v. Metz, 32 N. J. L. 199; State v. Northern Central R. Co., 18 Md. 163; Covington, etc. B. Co. v. Mayer, 31 Ohio St. 317; Ohio, etc. R. Co. v. Weber, 96 Ill. 443; *In re* St. Paul & N. P. Ry. Co., 36 Minn. 85; Stone v. Farmers' Loan & T. Co., 116 U. S. 307; Peik v. Chicago, etc. Ry. Co., 94 U. S. 164; Sage v. Lake Shore, etc. R. Co., 70 N. Y. 220; People v. Lake Shore, etc. R. Co., 11 Hun, 1; Sprague v. Hartford, etc. R. Co., 5 R. I. 233; Central Trust Co. v. St. Louis, etc. R. Co., 41 Fed. Rep. 551, 7 Ry. & Corp. L. J. 456; Uphoff v. Chicago, etc. R. Co., 5 Fed. Rep. 545; Clark v. Barnard, 108 U. S. 436; Eaton, etc. R. Co. v. Hunt, 20 Ind. 457. But see Farnum v. Blackstone Canal Co., 1 Sumn. 46. Sometimes the statute authorizing the consolidation provides in terms that the consolidated company shall be equally subject to the laws of the State as the original company. Peik v. Chicago, etc. Ry. Co., 94 U. S. 164.

[21] Newport, etc. R. Co. v. Wooley, 78 Ky. 523.

[22] Quincy Bridge Co. v. Adams County, 88 Ill. 615.

[23] Muller v. Dows, 94 U. S. 444; Colglazier v. Louisville, etc. R. Co., 22 Fed. Rep. 568; Allegheny County v. Cleveland, etc. R. Co., 51 Pa. St. 228, 88 Am. Dec. 579; Ohio, etc. R. Co. v. Wheeler, 1 Black, 286; Central Trust Co. v. St. Louis, etc. R. Co., 41 Fed. Rep. 551, 7 Ry. & Corp. L. J. 456; Memphis, etc. R. Co. v. Alabama, 107 U. S. 581; Copeland v. Memphis, etc. R.

taxation,[24] of local regulation,[25] and of service of process.[26] The power of control which the State so acquires would, on principle, seem to be limited to local matters and apply to the company only in its capacity of a domestic corporation. A very difficult question suggests itself as to the power of the State to impose regulations affecting the company throughout its entire organization, and perhaps in contravention of privileges granted it in other jurisdictions. This question has never been squarely presented for decision. In Quincy Bridge Co. v. Adams County,[27] a proceeding to enforce a tax assessed in Illinois upon the capital stock of an Illinois and Missouri corporation, it was urged that the stock might also be assessed and taxed by the authorities of Missouri, but the court failed to see in that a sufficient reason why the control of the State of Illinois over an Illinois corporation should be surrendered or relaxed.[28] In Massachusetts, a statute[29] provides, that if a consolidated railroad company should increase its stock or extend its line of road without legislative authority of that State, its charter and franchise should "be subject to become forfeited and become null and void." Since it rests in legislative discretion to bestow or withhold its corporate franchise as it sees fit, and is competent for it to impose conditions upon its grants, no good reason is perceived why such regulation of consolidated corporations cannot be enforced, even in respect to transactions in a foreign jurisdiction, where a different rule prevails.

Co., 3 Woods, 651; Richardson, etc. v. Railroad Co., 44 Vt. 613.

[24] Quincy Bridge Co. v. Adams County, 88 Ill. 615, where it was held that the fact that the capital stock of an Illinois and Missouri corporation might be assessed for taxation in Missouri, was no reason why an assessment of it for taxation in Illinois was invalid. Ohio, etc. R. Co. v. Weber, 96 Ill. 444. But see State v. Metz, 32 N. J. L. 199; Pennsylvania v. Trenton B. Co., 9 Am. L. Reg. 298; Covington, etc. B. Co. v. Mayer, 31 Ohio St. 317.

[25] McGregor v. Erie Ry. Co., 35 N. J. L. 115; Stone v. Farmers' Loan & T. Co., 116 U. S. 397; Peik v. Chicago, etc. Ry. Co., 94 U. S. 164; Sage v. Lake Shore, etc. R. Co., 70 N. Y. 220; Minot v. Philadelphia, etc. R. Co., 18 Wall. 206.

[26] *In re* St. Paul & N. P. Ry. Co., 34 Minn. 85 Sprague v. Hartford, etc. R. Co., 5 R. I. 233.

[27] 88 Ill. 615.

[28] Recognized and approved in Ohio, etc. R. Co. v. Weber, 96 Ill. 443.

[29] St. Mass. 1871, ch. 389. See Attorney General v. Boston, etc. R. Co., 109 Mass. 99.

6. *Status of Consolidated Company as a Whole.*—The question has sometimes arisen as to whether the effect of consolidation is to create a single company having a domicil and the *status* of a domestic corporation in each of two or more States, or whether it simply creates a community of stock and interest between the component companies, but does not convert them into a single legal entity in the same way and to the same degree as to the consolidation of domestic companies. Several cases seem to hold that the separate existence of the consolidated companies continues to survive.[30] It is rather a question of metaphysics than of law, and the solution is of little practical importance, since, within the jurisdiction of each State from which it derives its powers, the consolidated corporation will be regarded as a domestic company, and its duplicate existence elsewhere will be ignored. But there is no room to doubt that a consolidated company is so far a legal whole that it may perform valid corporate acts, bind itself by contract or incur liability for its torts equally in all the States from which it derives its powers.[31] A stockholders' meeting can be legally held in either of them.[32] And a judgment rendered in one will bind the company everywhere.[33] A mortgage, though executed in but one State, will fix a lien upon its property extending through several States. Upon foreclosure the court having jurisdiction of the mortgagor and trustees may, acting upon a well-recognized principle of equity, decree the conveyance of that portion of the property in other States, and if necessary enforce the decree by process against the defendants.[34]

[30] Racine, etc. R. Co. v. Farmers' Loan & T. Co., 49 Ill. 331, 95 Am. Dec. 595; Farnum v. Blackstone Canal Co., 1 Sumn. 46; Platt v. New York, etc. R. Co., 26 Conn. 544; Bishop v. Brainerd, 28 Conn. 289; Paine v. Lake Erie, etc. R. Co., 31 Ind. 347.

[31] Union Trust Co. v. Rochester, etc. R. Co., 29 Fed. Rep. 609; Chicago, etc. R. Co. v. Maffitt, 75 Ill. 524; Graham v. Boston, etc. R. Co., 118 U. S. 161, 14 Fed. Rep. 753; Covington, etc. B. Co. v. Mayer, 31 Ohio St. 317; Muller v. Dows, 94 U. S. 444; State v. Northern Central Ry. Co., 18 Md. 193; Wilmer v. Atlanta, etc. Ry. Co., 2 Woods, 409.

[32] Graham v. Boston, etc. R. Co., 118 U. S. 161, 14 Fed. Rep. 573; Covington, etc. B. Co. v. Mayer, 31 Ohio St. 317.

[33] Union Trust Co. v. Rochester, etc. R. Co., 29 Fed. Rep. 609. But not an interlocutory order. Taylor v. Atlantic, etc. R. Co., 55 How. Pr. 275.

[34] Muller v. Dows, 94 U. S. 444. See also State v.

7. *Powers, Privileges and Exemptions of the Component Companies.*—The powers, privileges and exemptions of the component companies will, in the absence of legislative restrictions, pass to the consolidated company to be enjoyed exactly as previously held, neither enlarged nor diminished by the consolidation.[35] Thus, where property of one of several railroads was exempt from taxation under its charter, that exemption was held not to be affected by the subsequent consolidation of the companies, but could be claimed by the consolidated company to the extent to which it had applied to the property of the original company, and no further.[36] Of course the consolidation cannot have the effect to extend the operation of the laws of one State into the jurisdiction of another, notwithstanding the statutes authorizing it purport to vest in the new company, the rights and privileges which the original companies had previously possessed under their separate charters.[37]

8. *Liabilities of Component Companies.*—The consolidated company succeeds to the liabilities as well as the privileges and exemptions of its component elements. Thus, where a railroad corporation had, in violation of its charter, so constructed a bridge over a non-navigable stream as to obstruct the flow of water, it was held that the consolidated company into which it was merged was liable directly, and could not claim the position of a grantee whose grantor had created a nuisance, and that therefore it was not entitled to notice and request to abate, before an action could be maintained.[38]

9. *Citizenship.*—Interesting questions have arisen, particularly in the federal courts, as to the citizenship of interstate consolidated corporations. It was originally held by those courts that a corporation is not a citizen at all, and that the federal jurisdiction must depend upon the citizenship of its members.[39] The inconvenience of this doctrine is manifest, and the rule, finally adopted after mature consideration, is that while the citizenship of a corporation depends upon the citizenship of its members, it will be conclusively presumed, for jurisdictional purposes, that its members are citizens of the State from which it derives its corporate existence.[40] When a company, therefore, has been chartered by several States, it must, for jurisdictional purposes, be considered a citizen of each of them. This *status* is, within the limits of each of the States, to be regarded as exclusive. The company is not, there, a corporation or citizen of any other State. Hence, in the federal courts it cannot sue or be sued by a citizen of that State, notwithstanding it also derives a corporate existence from the laws of other States. The controversy is not "between citizens of different States."[41] On the other hand, if it is there sued by a citizen of another of the States which incorporated it, its *status*, as a citizen of the latter, will not be considered; and the federal jurisdiction will attach.[42] Such is the correct rule on principle, and it is sustained by weight of authority. Cases are not wanting, however, which refuse to accept the doctrine that the citizenship of the consolidated company is to be regarded, in each of the States by which it is chartered, as limited to that State. Thus in the circuit court for the district of Massachusetts, it was held that a company consolidated of cor-

Northern Cent. Ry. Co., 18 Md. 193; Wilmer v. Atlanta, etc. Ry. Co., 2 Woods, 409.

[35] Philadelphia, etc. R. Co. v. Maryland, 10 How. 376; Minot v. Philadelphia, etc. R. Co., 18 Wall. 206; Pittsburgh, etc. R. Co. v. Peich, 101 Ill. 157; State v. Comrs. on Railroad Taxation, 37 N. J. L. 240.

[36] Philadelphia, etc. R. Co. v. Maryland, 10 How. 376; Chesapeake, etc. R. Co. v. Virginia, 94 U. S. 718; Tomlinson v. Branch, 15 Wall. 460; Branch v. Charleston, 92 U. S. 677.

[37] Minot v. Philadelphia, etc. R. Co., 18 Wall. 206.

[38] Chicago, etc. R. Co. v. Moffitt, 75 Ill. 524.

[39] Bank v. Deveaux, 5 Cranch, 61.

[40] Louisville R. Co. v. Letson, 2 How. 497; Marshall v. Baltimore, etc. R. Co., 16 How. 314; Covington Drawbridge Co. v. Shepherd, 20 How. 227; Insurance Co. v. Ritchie, 5 Wall. 541; Cowles v. Mercer County, 7 Wall. 118; Railroad v. Harris, 12 Wall. 65; Steamship Co. v. Tugman, 116 U. S. 118; Rundle v. Delaware, etc. Canal Co., 14 How. 80; Paul v. Virginia, 8 Wall. 178; Sewing Machine Co.'s Case, 18 Wall. 574; St. Louis, etc. R. Co. v. Indianapolis, etc. R. Co., 9 Biss. 144; Allegheny County v. Cleveland, etc. R. Co., 51 Pa. St. 228.

[41] Uphoff v. Chicago, etc. R. Co., 5 Fed. Rep. 545; Ohio, etc. R. Co. v. Wheeler, 1 Black, 286; Johnson v. Philadelphia, etc. R. Co., 14 Am. L. Rev. 457; Burger v. Grand Rapids, etc. R. Co., 22 Fed. Rep. 561; Colglazier v. Louisville, etc. R. Co., 22 Fed. Rep. 568; Horne v. Boston, etc. R. Co., 62 N. H. 454, 12 Am. & Eng. Ry. Cas. 287; Memphis, etc. R. Co. v. Alabama, 107 U. S. 581; Allegheny County v. Cleveland, etc. R. Co., 51 Pa. St. 228; Chicago, etc. Ry. Co. v. Lake Shore, etc. Ry. Co., 5 Fed. Rep. 19.

[42] Railway Co. v. Whitton, 13 Wall. 270; Muller v. Dows, 97 U. S. 444; Union Trust Co. v. Rochester, etc. R. Co., 29 Fed. Rep. 609; Pennsylvania, etc. R. Co. v. St. Louis, etc. R. Co., 118 U. S. 290; Page v. Fall River, etc. R. Co., 31 Fed. Rep. 257.

porations of two States did not thereby lose its separate citizenship in each State, and was not precluded from maintaining an action against a citizen of one of them, if in its declaration it set out its citizenship as derived from the other.[43] And the Supreme Court of Kentucky held that, where each of two States created a corporation which was given the same name and powers, etc., either company was a non-resident in the other State and might there be sued as such, upon a contract made by the local company, on the ground that each was the other's agent.[44] But it is not believed that the doctrine of either of these decisions can be sustained.

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[43] Nashua, etc. R. Co. v. Boston, etc. R. Corp. 8 Fed. Rep. 458, 19 Fed. Rep. 804, 16 Eng. & Am. Ry. Cas. 488. See Chicago & N. W. R. Co. v. Chicago & Pac. R. Co., 6 Biss. 219.

[44] Newport, etc. B. Co. v. Wooley, 78 Ky. 524. *Contra:* Sprague v. Hartford, etc. R. Co., 5 R. I. 233.

NEGOTIABLE PAPER — DUE ON SUNDAY — PREMATURE PROTEST—LIBEL—DAMAGES.

HIRSHFIELD V. FT. WORTH NAT. BANK.

Supreme Court of Texas, Feb 16, 1892.

1. Rev. Stat. Tex. art. 2835, 2837, providing that certain holidays are to be regarded as Sunday as far as protest and demand are concerned, and that when Monday is such a holiday, demand and protest are to be made on the preceding Saturday, does not, unless Monday happens to be a holiday, affect the ordinary rule of the law merchant, that notes, without grace, falling due on Sunday are payable the following Monday.

2. An action by the maker of a note against the holder, who had protested it before maturity—for extortion in collecting protest fees and for damages to his reputation, is in the nature of an action for libel, and the language of the notice of protest not being actionable *per se*, he cannot recover without alleging and proving special damages.

3. Under Rev. Stat. Tex. art. 2421, authorizing the recovery of a penalty against an officer for demanding higher fees than those allowed by law, there can be no recovery in such a case where the fees charged were the legal fees fixed by statute, though they were charged for a premature protest and paid with full knowledge of all the facts.

In the court below the appellant, as plaintiff, filed suit against defendants, alleging in his petition that the Ft. Worth National Bank was a banking corporation duly incorporated under the laws of the United States, and that defendant Arnold was a notary public for Tarrant county, and a clerk and employee of defendant bank. That on the 17th day of September, 1890, plaintiff, Hirshfield, made, executed, and delivered to one J. W. Zook his certain promissory note in writing for the sum of $225, which is set out in said petition as follows: "$225.00. Fort Worth Tex., Sept. 17, 1890. Sixty days after date, waiving grace and protest, I, or either of us, jointly and severally promise to pay to the order of J. W. Zook two hundred and twenty-five 00-100 dollars, value received, with 10 per cent. interest per annum from date until paid, and 10 per cent. additional for attorney's fee, if collected by law. Negotiable and payable at the City National Bank, Fort Worth, Tex. W. H. Hirshfield." That thereafter, to-wit, on the ———day of September, and before the maturity thereof, said Zook sold, transferred, indorsed, and delivered said note of plaintiff's to the defendant bank. That thereafter, to-wit, on the 15th day of November, 1890, and before the maturity of said note, said defendants, conspiring and acting together, willfully and maliciously, and with gross negligence, illegally protested, and caused to be protested, plaintiff's said note, and made, issued, and uttered, published, and circulated, and caused to be made, issued, and uttered, published, and circulated, a certain written and printed protest thereof (and here is set forth the written extension of the protest in usual form); further alleging in said petition that thereafter, to-wit, on the maturity of said note, said defendants, still conspiring together, willfully, maliciously, fraudulently, and with gross negligence, demanded, collected, and caused plaintiff to pay them, in addition to the amount of the principal and interest of said note, the further sum of three dollars and fifty cents, which they, then and there, claimed and demanded as protest fees, on account of said illegal protest; and plaintiff, being then and there ignorant of and unadvised as to their right to collect said money, paid them the same upon their said fraudulent and illegal demand, which sum they converted to their own use and benefit. That plaintiff was, before the acts of the defendants as aforesaid, "of good reputation and credit, both as a citizen and business man," but the character of his business is not stated, whether a merchant or trader or not. That by reason of which said illegal, fraudulent, malicious, and grossly negligent acts of defendants plaintiff has suffered and been damaged, in body, mind, reputation, and credit, in the sum of $15,000, besides and in addition to the damage which he has sustained by reason of being caused to pay said pretended protest fees as aforesaid. He further claims the sum of $10,000 by way of exemplary damages, which he says he ought to recover by reason of the premises. To said petition defendant presented a general demurrer, which was sustained by the court. The plaintiff excepted to this ruling of the court, and declined to amend, whereupon the court dismissed the case, and plaintiff, excepting thereto, appealed. Explanatory of above statement: November 16th was the sixtieth day after the date of the note, excluding the day of the date, September 17, 1890; but November 16th was Sunday, as shown by the

calendar; hence the protest on November 15th, the Saturday preceding. Plaintiff assigns as error the action of the court upon the demurrer.

MARR, J. (after stating the facts): If the facts alleged in the petition constitute a cause of action, in any view of the case, under the law, then it was not subject to the general demurrer. Was the protest prematurely made, and consequently unauthorized and wrongful? We think so, unless the recognized rule under the law-merchant has been changed by our own statutory enactments. There is a conflict of authority, but, as we think, the weight of the authorities and the reasoning support the proposition that in case of a mere negotiable note, or a negotiable one without "days of grace," (like that in hand), falling due, according to its face, upon Sunday, payment cannot be required, nor protest made on the preceding Saturday. The following Monday is the proper date for presentment and protest, unless that is also a legal holiday. The rule is otherwise where days of grace can be claimed. Sunday, being *dies non*, and not a legal day for exacting payment, all banking business being suspended by law, cannot be computed, except when it is an intermediate day. To do so would make another contract for the parties, and, by requiring the defendant to pay on Saturday, compel him to meet the obligation before the time for its performance had arrived. Days of grace, however, were originally granted as mere indulgence, and hence the difference in the rules and usages upon this point. Avery v. Stewart, 2 Conn. 69, 7 Amer. Dec. 250, and note; 1 Daniel, Neg. Inst. § 627; Tied. Com. Paper, § 316; Salter v. Burt, 20 Wend. 205; Barrett v. Allen, 10 Ohio, 426; Kilgore v. Bulkely, 14 Conn. 363; Kuntz v. Tempel, 48 Mo. 75.

We are also of the opinion that our statutes have not made any change in the rule upon this subject, as above announced. They do not apply to the question in hand, nor prescribe what shall be the practice when the note matures on a Sunday, which is not also a legal holiday. The provisions of the statute, as will be seen upon a close scrutiny, only declare that certain legal holidays shall be treated as the Christian Sabbath in regard to the presentment and protest of bills and notes, etc., and that, in the event of the occurrence of Sunday and a legal holiday upon the date of the maturity of the paper, then it may be presented or protested upon "the preceding Saturday." Rev. St. arts. 2835, 2837. The law, as applicable to notes maturing on Sunday alone, remains as it was before this enactment. If the legislature had intended to recognize the law as already allowing the protest or presentment upon "the preceding Saturday," then the enactment of article 2835 would have been adequate for that purpose, if such had been the established rule. Article 2837 was therefore enacted to provide for a different state of case. We conclude that the plaintiff's note of hand was prematurely and wrongfully protested, but it still remains to decide whether he has otherwise shown a good cause of action.

If he can recover at all (aside from the question of extortion), upon the case as made by the petition, then it must be upon the ground that the acts of the defendant in making and extending the protest of the plaintiff's note, if passed, or uttering and publishing by such means the fact that it had been dishonored, amount to a libel upon his business reputation or commercial credit. He has alleged no special damages, and unless, therefore, the words are actionable *per se*, the demurrer was correctly sustained upon this branch of the case. Odger, Sland. & L. 308, 310, 313, 315; Bradstreet Co. v. Gill, 72 Tex. 115, 9 S. W. Rep. 753. The mere act of protesting the note, regarded as a wrongful act, could not give a right of action for more than nominal damages. The substantial damages result, if at all, from the publication of the act or fact of protest; hence the wrong partakes of the character of a libel or slander, and should accordingly be governed by the same principles of law. The decision in Rolin v. Steward, 14 C. B. 594, was based on a breach of contract, though general damages seem to have been allowed after the disclaimer of the draft was published. 3 Lawson, Rights, Rem. & Pr. 1236.

We waive the omission of the plaintiff to allege that he was a merchant or trader, and the absence of any innuendo in this particular (as there was no special exception), though such an obligation is of vast importance. Odger, Sland. & L. 63; Cooley, Torts, 202. We concede, also, that to charge a merchant or trader falsely with being a bankrupt or insolvent, or with dishonesty in his business, whether the accusation or imputation is made in writing or by words of mouth, would present a case where the language should be held to be actionable *per se*, and give right of action, with or without special damages. Authorities *supra;* Newell v. How, 31 Minn. 235, 17 N. W. Rep. 383; 13 Amer. & Eng. Enc. Law, pp. 306, 314, notes.

But we are of the opinion that the language contained in the writing or official extension of the act of protesting the note which is set out in the petition and made the basis of the suit does not impute, directly or indirectly, insolvency or dishonesty to the plaintiff, or a want of ability or disposition to pay any past debt. It is this writing that the plaintiff alleges the defendants made, uttered, and published concerning himself, and which caused damage to his credit. The writing does not by any means, necessarily or naturally, have that effect, so that the law would presume damages from its publication. The instrument merely recites that upon the 15th day of November, 1890, the notary, (who is defendant Arnold), at the request of the other defendant, who was the holder of the note, presented the same during the hours of business to the teller of the bank, where the note was payable, and "demanded payment thereof, which was refused." That thereupon the notary, "at the request of" holder, "protested solemnly" against the maker, and indorsed, etc., as is usually done in such cases; of all of which,

according to the instrument, he gave notice as follows: "To W. H. Hirshfield, (maker), by mail, to W. J. Zook, (indorser), by mail." This seems to have been the extent of the publication. 1 Daniel, Neg. Inst. §§ 939, 940, 950.

The legal effect and the purpose of the protest, as well as the formal notarial attestation thereof, are simply to fix the liability of the drawer or indorser on the bill or note to which he is a party, and to prevent a loss to the owner by reason of the non-acceptance or non-payment, as the case may be, by the maker or drawer. The notary is called upon to witness and attest the essential facts which establish the liability, viz., due presentment and the refusal of payment, etc. *Id.* § 929. We very much doubt that the writing in question is actionable at all. All of its statements are true, and it does not appear to bedefamatory. A copy of the note is annexed to and made a part of it, as set forth in the petition. There is no innuendo, if admissible here, that the intent and purport was to charge the defendant with refusing to pay a just debt which had then matured. This conclusion would not naturally be drawn by any one who might read the instrument in connection with the note, and it certainly contains no words to that effect. The reader, presumed to know the law, would see that the protest had been made before the note was due, and hence that the plaintiff had the most excellent reason for not paying it at that time. Let us illustrate. Suppose the defendants had published in a newspaper the statement that the plaintiff had, after demand duly made upon him, refused to pay, on the 1st day of June, a note upon which he was duly bound, but which by its terms did not become due or payable until 20th day of July. That would not be libelous, although the defendants may have been actuated by malice. "Acts which neither the moral code nor the law of the land requires it cannot be libelous to charge him with not performing." Cooley, Torts, 207; Odger, Sland. & L. 308. The damages are not the natural or legal consequences of the language.

But we will take the most liberal view in favor of the plaintiff of which the language used will admit, and concede that the ordinary effect or import of such language, in connection with the fact of protest, would be to impute to the plaintiff a failure and refusal to pay his note of hand after it had fully matured. This is certainly as far as the concession can be extended, for the language used by the defendants, and by which alone they must be judged, does not affirm the justness or validity of the obligation. The accusation must also be confined to a single note, because they have not said that he refused to meet any other obligation, or was in the habit of refusing to pay his notes. Under such circumstances, we think that it is obvious that the writing is not actionable *per se*. The refusal to pay this particular note may have been justified by sufficient reasons. It may have been an illegal or unjust allegation, or may have already been paid by the plaintiff; hence was allowed to go to protest without any fault upon the part of the plaintiff. We mean by this that the act imputed to the plaintiff was susceptible of the above explanations, and therefore neither the acts nor the language of the defendants necessarily, or in the ordinary tendency or meaning, charged the plaintiff with insolvency, loss of credit, or with dishonest conduct in business. In such case the law does not presume an injury to the plaintiff, and allow the recovery of general damages, as when the words are actionable in themselves; for the plaintiff's credit or reputation as a tradesman may or may not have suffered any injury, according to the circumstances, by the publication of such alleged defamatory matter as would not necessarily or ordinarily injure, or tend to injure, him in these particulars. If it did so injure him in this instance, then the fact should have been alleged showing the special injury. We are clear, therefore, in the conviction that the writing declared on as a libel is not actionable *per se*, and consequently that the allegations of the petition do not show any rights to recover damages for its publication. Zier v. Hofflin, 33 Minn. 66, 21 N. W. Rep. 862; Pratt v. Press Co., 30 Minn. 41, 14 N. W. Rep. 62; Newbold v. Bradstreet, 57 Md. 38; Cooley, Torts, 203 205.

Where the libel is not actionable *per se*, mental anguish cannot be allowed as a part of the damages, (if recoverable in any case), without proof of some other injury or damage. Odgers, Sland & L. 310, note; Cooley, Torts, 204, and note 3; Trawick v. Martin-Brown Co., 79 Tex. 460, 14 S. W. Rep. 564; Railway Co. v. Levy, 59 Tex. 563.

It should perhaps also be added that in Odger on Libel and Slander (cited above) it is stated, on page 297, that it is not necessary to prove special damages "in any action of libel," from which it might be inferred that such damages need not be alleged in any case of libel. We cannot subscribe to this doctrine. That would abolish the well-recognized distinction, even in cases of libel, between words actionable in themselves and those that are not, and make all libels actionable *per se*. We concede that there may be words used in a published writing or public print, etc., which might be actionable *per se* as libels, where, if only spoken, they would not be; but still we think that, unless the libel is of that class, the plaintiff must, as he would be bound to do in case of slander under such circumstances, allege, in addition to an innuendo showing the impressions necessary of the language, some special injury or damage to himself, arising as the natural and immediate consequence of its publication. Cooley, Torts, 204-206; 13 Amer. & Eng. Enc. Law, 435, and note 3; 3 Lawson, Rights, Rem. & Pr. p. 176; 72 Amer. Dec. 428, note 2; Achorn v. Piper, 66 Iowa, 694, 24 N. W. Rep. 513; 33 Minn., *supra*; Bell v. Print Co., 3 Abb. N. C. 157; Wallace v. Bennett, 1 Abb. N. C. 478; Walker v. Tribune Co., 29 Fed. Rep. 827; Lewis v. Chapman, 16 N. Y. 369.

We now reach the determination of the question whether the petition shows any right to recover damages on account of the alleged extortion. On this point appellees' counsel say: "We do not think the fees received by the notary were illegal or extortionate, in the sense of the criminal statute. They were the ordinary and usual fees charged for protesting, and, if the appellant had declined to pay, the notary had no means of compelling him to do so, either by seizing his person or property. The act was purely voluntary and unconstrained on the part of the appellant. It is not even alleged that he paid them under protest, or in any wise signified his unwillingness or objection to do so." We approve of this position, and hold that the fees, having been paid by the plaintiff voluntarily, with full knowledge of all the facts, and, at most, only under a mistake of law, cannot be recovered back, unless he is entitled to do so by virtue of our statute which prescribes a penalty for the benefit of the injured party against the officer for securing, as well as demanding, illegal fees, under certain circumstances. City of Houston v. Feeser, 76 Tex. 365, 13 S. W. Rep. 266; Taylor v. Hall, 71 Tex. 213, 9 S. W. Rep. 141. Article 2421 of the Revised Statutes extends the penalty only where the officer has demanded and received "higher fees" or "any fee" not allowed by title 42 of the statutes. Under the construction heretofore given to very similar provisions of law by both the supreme court and the court of appeals, the acts of the defendants, as shown by the petition, are not within the provisions of article 2421, and do not amount to extortion, as there defined. Orton v. Engledow, 8 Tex. 205; Hays v. Stewart, *Id.* 357; Smith v. State, 10 Tex. App. 413. It is intimated in Hays v. Stewart, *supra*, that while the fourfold penalty could not be recovered under such circumstances, yet the amount of fees illegally received by the officer might be; but the court did not admit to the effect of a voluntary payment with knowledge of the facts, or to the want of any power in the officer to enforce payment had it been refused. Article 240 of the Penal Code, even as amended, confers no right to recover back the fees when they, and such as are prescribed by law for the services performed, have been voluntarily paid; and we conclude, therefore, that the plaintiff, under the facts stated in the petition, was not entitled to recover, as a part of his damages, the fees he had paid the notary. See, also, Millar v. Douglass, 42 Tex. 288; 1 Daniel, Neg. Inst. § 934. The decision of this question, where the amount is clearly below the jurisdiction of the district court, is only important, therefore, as affecting the right to recover exemplary damages, as claimed in the petition. That character of damages is not recoverable without some actual damage is also shown. Trawick v. Martin-Brown Co., 79 Tex. 460, 14 S. W. Rep. 564; Flanagan v. Womack, 54 Tex. 50. The petition, failing to disclose any right to recover actual damages, was insufficient upon the demurrer, and therefore the judgment should be affirmed.

NOTE.—In the conflict of authority mentioned in the above opinion as to the proper date of presentment for payment, of a note which by its terms falls due on a Sunday or legal holiday, the American text-writers have, without exception, adopted the view that the maker cannot be compelled to pay sooner than he promised to pay, and the demand must be made on the next regular business day. Dani. Neg. Inst. § 627; Tiedeman Comi. Paper, § 316; 1 Pars. N. & B. 400.

A brief analysis of the decisions which are cited for and against this doctrine cannot fail to be interesting. The leading case holding this view is Avery v. Stewart (1816), 2 Conn. 69, 7 Am. Dec. 250; that was a suit on a non-negotiable note payable in "cotton yarns." The decision was by a divided court. Said Swift, C. J., in the majority opinion: "The obligor cannot be bound to tender on the preceding day; for no man is bound to perform a contract before the time of payment; and no action can ever lie against him for non-performance before that time. Though he cannot perform the contract on the day it falls due, because it would be an unlawful act, yet that does not exonerate him from his obligation. It would be unjust to subject him to pay damages for the non-performance of a contract when it was unlawful for him to do it. The only way then to do justice to both parties is to permit the tender to be made on the succeeding day; and this is conformable to a general principle of law, that where the obligor cannot perform a contract according to the literal terms of it, he shall perform it as nearly as possible. This violates no principle, and does justice to all the parties." This decision was followed without discussion by the New York Supreme Court, in Salter v. Burt (1838), 20 Wend. 205, and in Ohio, by a divided court, the same view was adopted in a suit on a note payable in woolen cloth. Barret v. Allen (1841), 10 Ohio, 426.

Among the earlier American decisions taking the opposing view is the much quoted case of Kilgour v. Miles (1834), 6 Gill & J. 268, which was a suit on a contract for the delivery of certain corn "on the first day of July next." The court held that the legal effect of the contract required its execution on Saturday, saying: "We have no statute or Maryland decision to guide us, and in the case in 2 Conn. Rep. (Avery v. Stewart, *supra*), the only one produced, we find a great diversity of opinion among the judges. In the commercial community, as is admitted in the argument, the usage is established. In bank transactions, drafts, bills of exchange, and negotiable paper amongst mercantile men, the pecuniary engagements becoming due on Sunday according to the letter of the agreements, are discharged on the previous Saturday, and we think that both analogy and convenience will be consulted, by deciding that the same rule shall govern other cases." But the leading authority is Doremus v. Burton (1860), 5 Biss. 57, decided by the United States Circuit Court for the Eastern District of Wisconsin. That was a suit on a negotiable note, with grace waived, which fell due on Sunday. The court held that demand and protest were properly made on Saturday to charge the indorser. The court refers to the fact that the decision in Avery v. Stewart, *supra*, was by a divided court, and notes that the New York case of Salter v. Burt, 20 Wend. 205, following it, was a suit on a post-dated check, payable on its date, which was Sunday, and says that it was "apparent it could not be presented at bank for payment on Saturday, as it did not bear date on that day, but the

day following. If did not purport to have been written on Saturday. * * * It is very certain that a presentment of the check on Saturday would be premature." But why is it a greater violence to the terms of the note to disregard its date, than to anticipate its maturity? Though it does not purport to be written on Saturday, when presented for payment on that day it is present and in existence, and does purport to have been written on a day when it could not be presented. The distinction is rather fanciful than real. The court adds a more substantial ground of decision: "When the note was made the maker may possibly have known that the day of payment would fall on a day on which it would be illegal to make demand. At all events the instrument is to be considered against the maker, and upon such principles is not to be so construed as to allow an indorser to escape." See also Barker v. Parker, 6 Pick. 80.

The same result was reached in Osborne v. Smith, a suit on a post-dated check, decided by the Superior Court of New York city in 1836 (before Salter v. Burt, 1838, 20 Wend. 205), and reported in full in the note to Kilgore v. Bulkley, 14 Conn. 366. Say the court: "It is in our view of it a mistake to suppose that this anticipation, in such cases, of the day of payment is confined to negotiable paper entitled to grace, and makes part of the custom which allows grace, simply reducing the time from three to two days, when the last of the three days usually allowed falls on a Sunday, as defendant's counsel contend. There is no such distinction to be found in the books; and we see no just ground on which it can rest. The same reason and the same necessity exists for making the paper, not entitled to grace, which falls due on Sunday, payable on Saturday, as exists for requiring paper entitled to grace falling due on Sunday to be paid on Saturday, if both species of paper are negotiable mercantile paper; and there would be manifest inconvenience in any distinction in this respect between them. The cases cited by the defendant's counsel do not, in our view of them, give any countenance to such a distinction. They were, it is true, cases of notes entitled to grace, and Sunday was the last day of grace; and in one of them the judges do advert to the circumstance that the acceleration of the day of payment had the effect of shortening the term of grace, but that was not the point on which the decision turned. The question was whether the common law rule securing to the obligor the entire term of credit or time for payment in the fulfillment of his obligation, or the commercial usage in favor of promptness of payment should prevail and govern the case, and the court decided in favor of the mercantile usage on the ground of its being a case of negotiable commercial paper, and on the principle of the law merchant, which gives to usages of long standing and general notoriety the force of laws."

The case of Sanders v. Ochiltree, 5 Porter (Ala.), 73, 30 Am. Dec. 551, was rather peculiar in its facts. A note payable one day after date was made on Saturday. On such notes no grace is allowed, and the note was by its terms due on Sunday. The court say, however, that it was the manifest intention of the parties that the note was not to be paid on the day it was made, and therefore hold that it fell due on Monday. They decline to accept the doctrine of Avery v. Stewart, 2 Conn. 69, and concur in the opinion of the minority in that case, saying: "Where a contract is to be performed within or at a stipulated time, or a specified number of days after date, and the day fixed for performance is not the next day after the date, and happens to be a Sunday, the contract ought to be performed the day before."

So the cases stand. The doctrine that paper without grace, which falls due on Sunday is payable on Monday, though accepted by the text-writers, rests solely upon the authority of Avery v. Stewart, *supra*, and Barret v. Allen, *supra*, both decided by a divided court, and both suits on contracts to deliver articles of merchandise, and Salter v. Burt, *supra*, which was decided upon the authority of Avery v. Stewart. Opposed to these, and holding that such paper is payable on the Saturday preceding are: Kilgour v. Miles, *supra;* Doremus v. Burton, *supra*, and Sanders v. Ochiltree, *supra*. Of these the first was on a contract for the delivery of corn, but the other two were on commercial paper. This circumstance seems to me important. The argument in favor of the rule making such paper payable on Monday, that the obligor cannot be compelled to perform his contract before the time fixed is unsubstantial. When reversed it applies equally to the payee. He cannot lawfully be compelled to wait for his money until Monday. The only ground on which the variation from the actual terms of the contract can be justified is that neither the obligor nor the obligee at its inception intended an unlawful act. Otherwise it would be void. But both must be taken to have contemplated the performance of the contract on the day indicated by a legal interpretation of the contract. Whether this day is to be Monday or Saturday must depend upon other reasoning than that of Avery v. Stewart. I think the true solution is suggested in Osborne v. Smith, at least in the case of negotiable paper, that commercial usage in favor of promptness of payment should control, and that demand ought to be made on Saturday. The conclusion is that the text-writers are in error. Such a rule is not without support in other cases of computation of time. In Patrick v. Faulke, 45 Mo. 312, where the time for filing a mechanic's lien expired on Sunday, it was held that the lien must be filed on the preceding Saturday. See also *Ex parte* Dodge, 7 Cow. 147; Beerme v. Wellington, 1 Sandf. 664; People v. Luther, 1 Wend. 42; Lindenmuller v. People, 33 Barb. 568, 21 How. Pr. 156; Thayer v. Felt, 4 Pick. 354.

WM. L. MURFREE, JR.

BOOK REVIEWS.

FINCH'S INSURANCE DIGEST.

This is a volume of two hundred pages, containing digests strictly of insurance cases, and embraces the decisions of the Supreme and Circuit Courts of the United States, of the supreme and appellate courts of the various States and foreign countries upon disputed points in fire, life, marine, accident and assessment insurance, and affecting fraternal benefit orders, with reference to annotated insurance cases and editorials in law journals on insurance questions for the year ending October, 1891. The editor is Mr. John A. Finch, a prominent member of the Indianapolis Bar, and an authority upon questions of insurance. The value of the book to practitioners interested in insurance law may readily be understood. The work is well prepared, and has an index to the digests which form the body of the work. We think, however, its value for ready use would be enhanced by a more methodical alphabetical arrangement of the subjects of the digests, though in some respects the index supplies this omission. The book is published by The Rough Notes Company, Indianapolis.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCIDENT INSURANCE—Pleading.—Where, in a suit on an accident policy providing that the assured, a railroad switchman, should at all times use due care for his personal safety, the insurer pleads that the assured failed to use due care, but contributed directly to his injury by getting off a moving engine with his back toward the direction in which it was going, a replication which does not deny that the assured failed to use due care, but only alleges that he was insured as a switchman, and that the injury occurred while in the discharge of his customary duties, is insufficient in assuming that the policy would cover all such injuries, whether the assured was in the exercise of the due care or not.—*Standard Life & Acc. Ins. Co. v. Jones*, Ala., 10 South. Rep. 530.

2. ACCORD AND SATISFACTION—Fraud.—An answer set up an accord in writing, by which plaintiff agreed to accept in full settlement a certain portion of his claim, and payment of such portion in satisfaction of the claim, evidence by a release in writing, signed by plaintiff. The release acknowledged the receipt of such payment "as full compromise and adjustment" of all claims: *Held*, that plaintiff might show that such accord was procured by false representations, and that they were carried forward and operative in procuring the release.—*Ball v. McGeoch*, Wis., 51 N. W. Rep. 443.

3. ADMINISTRATION — Distribution.—Under Code Civil Proc. § 1664, which provides that, in all estates now being administered, any person claiming to be heir to the deceased, or entitled to distribution, in whole or in part, of such estate, may file a petition praying the court to "declare the rights of all persons to said estate and all interests therein, and to whom distribution thereof should be made," etc., one who has, by purchase, succeeded to the rights of the heirs to land before distribution may maintain her petition in the superior court for the determination of the title, and for distribution.—*In re Burton's Estate*, Cal., 29 Pac. Rep. 36.

4. ADMINISTRATION — Growing Crops.—An administrator is entitled to a crop of cotton, the cultivation of which was practically completed at the intestate's death, but which was harvested and sold by the heirs.—*Marx v. Nelms*, Ala., 10 South. Rep. 551.

5. ADMINISTRATION — Unadministered Estate.—A daughter died intestate, leaving a note, which her mother was entitled to as distributee. No administration was had. The mother took possession of the note, and in good faith sold it to defendant for a good consideration. After the mother's death an administrator of the daughter's estate was appointed, and he brought replevin for the note: *Held*, that the mother had no legal or equitable interest in the note, and her assignee acquired no such interest as entitled him to equitable relief in an action at law provided by St. 1883, ch. 223, § 14.—*Pritchard v. Norwood*, Mass., 30 N. E. Rep. 80.

6. ADVERSE POSSESSION—Color of Title.—A father devised land to his son R, with a limitation over to his son C in case R should die without issue. R died without issue, and C conveyed by deed to L, which deed was duly recorded: *Held* that, though the limitation was void as being after an indefinite failure of issue, yet the deed gave L color of title, and his entry thereunder vested in him adverse possession of the whole tract.—*Zurman v. Hubner*, Md., 23 Atl. Rep. 646.

7. ASSIGNMENT—Pleading.—A complaint in an action by the assignee of an account, which neither makes the assignor a party defendant, nor avers an "indorsement in writing," is demurrable for defect of parties defendant under Rev. St. 1881, § 276, providing that "when an action is brought by the assignee of a claim arising out of contract, and not assigned by indorsement in writing, the assignor shall be made a defendant, to answer to the assignment of his interest in the subject of the action.—*Watson v. Conwell*, Ind., 30 N. E. Rep. 5.

8. ASSIGNMENT FOR BENEFIT OF CREDITORS.—A general assignment by a debtor of all his real and personal property will carry his vested interest as a residuary legatee of an estate, though such interest was not included in the inventory, and it was not his intention to assign it.—*Meeker v. Felts*, N. J., 23 Atl. Rep. 672.

9. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Code, § 2123, subjecting a general assignee for the benefit of creditors to the supervision of the court, whereby the law determines the management and disposition of the assigned property, places property regularly assigned to and in possession of such assignee in the custody of the law; and, as section 2121, authorizing creditors to contest any claim filed, amply protects a creditor against fraudulent claims he should not be allowed, in an action against the assignor, to attach assigned property in the hands of the general assignee.—*Hamilton-Brown Shoe Co. v. Mercer*, Iowa, 51 N. W. Rep. 415.

10. ASSIGNMENT FOR BENEFIT OF CREDITORS—Extra-territorial Effect.—A common law assignment in New York for benefit of creditors conveys a claim of the debtor against a resident of Connecticut who receives notice thereof; and a subsequent attachment of the claim by a Connecticut creditor is ineffectual.—*First Nat. Bank Rockville v. Walker*, Conn., 23 Atl. Rep. 696.

11. ATTACHMENT — Insolvent Corporation.—Where a corporation, though heavily in debt, continues doing business, creditors who have attached its property on the ground of its non residence are not deprived of their rights under the attachments by a subsequent assignment for the benefit of creditors.—*First Nat. Bank of Tullahoma v. North Alabama Lumber & Manuf'g Co.*, Tenn., 18 S. W. Rep. 406.

12. ATTACHMENT—Variance.—Where an affidavit for attachment describes the instrument sued on as a note, "with interest from Dec. 2, 1890," and the petition describes it as a note dated December 2, 1890, due 60 days after date, "with interest from maturity," the variance is sufficient cause for quashing the writ of attachment.—*Moore v. First Nat. Bank of Kaufman*, Tex., 18 S. W. Rep. 657.

13. ATTORNEY AND CLIENT—License.—Where only one member of a firm of attorneys has paid his privilege tax, prescribed by Code, § 539, imposing a license tax on each person (not each firm) practicing law, and declaring that all contracts made with any person who shall violate the act, in reference to the business carried on in disregard of the law, shall be null and void, an entire joint, and several contract made with the firm for their services is void, though the other member may have paid his license; and a claim thereunder cannot be enforced by an assignee of the firm.—*McIver v. Clarke*, Miss., 10 South. Rep. 581.

14. BANKS—Checks—Forged Indorsement.—The payee of a check whose indorsement has been forged thereon has no right of action against the bank upon which it was drawn, for money had and received, because the bank, supposing the indorsement to be genuine, charged the amount of the check to its depositor, the drawer, credited its correspondent from whom the check was received with an equal amount, and afterwards, upon discovery of the forgery, returned the check to its correspondent, and made entries in its books equivalent to a cancellation of its former entries. —*Freeman v. Savannah Bank & Trust Co.*, Ga., 14 S. E. Rep. 577

15 BANKS—Insolvency—Stock.—The fact that a bank president invests, without authority, in the stock of the bank, money which he holds as executor of an estate, and a few days before the suspension of the bank causes the stock to be resold to the bank at bar, and a certificate of deposit to be issued, does not confer upon the estate any greater rights than those of a stockholder, or allow it to recover, as against creditors, the price agreed upon.—*In re Columbian Bank*, Penn., 23 Atl. Rep. 625.

16. CARRIERS OF LIVE-STOCK—Evidence. — Where a railroad company requires the shipper of stock and the conductor of the train to sign a written statement of the condition of the stock, attested by a third person, such paper will not be received in evidence unless its execution is proved by the subscribing witness, or the failure to produce such witness is explained.—*International & G. N. Ry. Co. v. McRae*, Tex., 18 S. W. Rep. 672.

17. CARRIERS OF PASSENGERS — Collision of Trains.—When a passenger is injured by the collision of trains at a crossing of two railroads, each company is liable in full if its servants are negligent; and hence in an action against both it is proper to refuse an instruction requested by one, correctly defining the duty of the other with respect to the care to be exercised in approaching the crossing, and casting upon it the liability in case the jury found a breach of the duty. Both companies are bound to the same degree of care, and the instruction should be made applicable to both.—*Kansas City, F. S. & M. R. Co. v. Stoner*, U. S. C. C. of App., 49 Fed. Rep. 209.

18. CERTIORARI TO COUNTY COMMISSIONERS.—On a petition for a writ of *certiorari* to review the proceedings of county commissioners on an appeal from an assessment, it is essential for the commissioners to return the full record of their proceedings, if the same is not attached to the petition; and it is insufficient merely to file an answer setting forth generally such matters as they deem available as a defense.—*Haven v. Essex County Com'rs.*, Mass., 29 N. E. Rep. 1083.

19. CONSTITUTIONAL LAW — Taxation.—The taxing power is a legislative power, and such power passed to the territorial legislature of Dakota by virtue of the general grant of legislative power made by congress in the organic act. The power resided in the the legislature without any limitations or restrictions whatsoever upon its exercise, except such limitations as were imposed by the organic act itself and the federal constitution.—*Northern Pac. R. Co. v. Barnes*, N. Dak., 51 N. W. Rep. 386.

20. CONTRACT — Interpretation. — A manufacturing company having offered to remove its plant to another town, a committee of the inhabitants was appointed to investigate its financial standing, but on the plea of expense in taking an invoice during the busy season, the directors executed a guaranty that an invoice would show a certain standing "on April 1, 1888," (a future date): *Held*, that this implied a promise to take an invoice showing the condition on that date within a reasonable time, and a failure to do so was a breach of the contract.—*Fort Wayne Electric Light Co. v. Miller*, Ind., 30 N. E. Rep. 23.

21. CONTRACTS—Performance.—Plaintiff, in acceptance of defendants' offer to furnish printing outfit for a newspaper at a certain discount off list prices, made an order, including therein some 300 pounds of long primer and brevier type of certain styles: *Held* that, though the order included many items, each having a separate value, the transaction was an entirety, and that, defendant having failed to send type of the styles ordered plaintiff was not obliged to accept any part of the outfit.—*Sefton v. Minnesota Type Foundry Co.*, Oreg., 29 Pac. Rep. 6

22. CONTRACTS—Statute of Limitation. — A contract for the joint acquisition of land, by which one party impliedly bound himself to convey to the other a half interest in the land as soon as he acquired the legal title, is a contract for the conveyance of the real estate within the meaning of the statute of limitations.—*Boon v. Chamberlain*, Tex., 18 S. W. Rep. 655.

23. CORPORATIONS—Directors.—Where three persons, a majority of the directors of a corporation, each being a salaried officer, pass a vote appointing one of their number as the agent of the corporation to make a contract with the others, and then pass another vote appointing one of the latter to make a contract with the first one, continuing in force for a certain time agreements which were about to expire, and by which they were to receive a certain salary, such contracts are voidable by the corporation.—*Mallory v. Mallory-Wheeler Co.*, Conn., 23 Atl. Rep. 708

24. COSTS—Security.—A wife petitioning for a writ of *habeas corpus* to obtain from her husband, who resides in the State, the custody of their child, cannot be required, without proofs, to give bond as a non-resident, since her domicile is *prima facie* the same as her husband's.—*Curtis v. Curtis*, Ind., 30 N. E. Rep. 18.

25. COUNTIES—Appeal.—Under Gen. St. § 547, providing that "when any claim of any person against the county shall be disallowed in whole or in part by the board of commissioners, such person may appeal from the decision of such board to the district court of the same county," no appeal lies where a claim was presented to the commissioners, and a motion by one of them to allow it as presented was lost, and a subsequent motion providing for a reference to the county attorney for an examination and report by him was carried.—*Board County Comr's of Gunnison County v. McCormick*, Colo., 29 Pac. Rep. 25.

26. CRIMINAL EVIDENCE—Character.—Where defendant, on trial for embezzlement, had not put his character in issue, it was error for the trial court to permit a judgment of conviction against defendant for burglary to be introduced and read in evidence in order to overcome defendant's application for a continuance on the ground of the absence of a witness by whom it was expected to prove the good character of defendant.—*Felsenthal v. State*, Tex., 18 S. W. Rep. 644.

27. CRIMINAL LAW—Concealed Weapons.—In a criminal prosecution for carrying a concealed pistol, evidence that defendant, having been lawfully arrested while in the act of violating a municipal ordinance, was searched, and the weapon found upon him, is admissible.—*French v. State*, Ala., 10 South. Rep. 553.

28. CRIMINAL LAW — Homicide—Self defense. — The court properly charged that "to justify the killing of another in self defense it must appear that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary;" the words "it must appear" clearly referring to defendant, and not to the jury.—*People v. Bruggy*, Cal., 29 Pac. Rep. 26.

29. CRIMINAL LAW — Manslaughter. — Under the evidence, taken in connection with the prisoner's statement, a verdict for voluntary manslaughter was correct; and, although the court committed some errors in admitting evidence, these errors were harmless, inasmuch as they bear upon the charge of murder, of which offense the prisoner was acquitted.—*Mays v. State*, Ga., 14 S. E. Rep. 560.

30. CRIMINAL LAW—Sentence.—Where a judgment of conviction and for fine and costs was rendered against defendant on trial for crime, and an appeal taken to the supreme court, where the judgment was affirmed, the trial judge cannot sentence defendant to hard labor at its next succeeding term; such alternative sentence be-

ing available only during the term at which conviction was had, under sections 4503, 4504.—*In re Newton*, Ala., 10 South. Rep. 549.

31. CRIMINAL TRESPASS—Notice.—Under Gen. St. § 2507, providing that "every entry on the inclosed or uninclosed land of another, after notice from the owner or tenant prohibiting the same, shall be deemed a misdemeanor," it is not necessary that the person giving such a notice should hold the legal title to the land.—*State v. Green*, S. Car., 14 S. E. Rep. 619.

32. CRIMINAL TRIAL—Substitution of Juror.—After all the evidence for the State has been heard by the traverse jury on a trial for felony, it is not lawful to change the constitution of the jury by discharging one of its members as incompetent because he was on the grand jury that found the bill, and substituting in his place a fresh juror, and then proceeding with the trial, the prisoner not consenting to such substitution, but insisting that a mistrial should be declared.—*Simmons v. State*, Ga., 14 S. E. Rep. 613.

33. CRIMINAL TRIAL — Witnesses.—Even if Gen. St. § 2643, providing that in criminal cases the defendant may, if he chooses, testify as to the facts of the case, makes a defendant who is infamous competent in his own behalf, it does not make him competent as against a co defendant.—*State v. Peterson*, S. Car., 14 S. E. Rep. 617.

34. DEATH BY WRONGFUL ACT.—Mansf. Dig. §§ 5225, 5226, provide that the administrator of a deceased minor, whose death was caused through the wrongful act or neglect of another, may sustain an action for the benefit of decedent's next of kin for loss of services, accruing after death: *Held*, in an action by the administrator for the benefit of a dependent father, where the proof showed an intent on the part of decedent, a minor son, to aid his parent after majority, that plaintiff's right to recover was not limited to the value of decedent's services during minority.—*St. Louis, etc. Ry. Co. v. Davis*, Ark., 18 S. W. Rep. 628.

35. DEED—Acknowledgment. — Where the title of an officer taking an acknowledgment of a deed is written out in full in the body of the certificate, its omission from the signature is immaterial, and affixing it to the signature is itself sufficient. Initials may, however, be used, and are sufficient to designate such title.—*Summer v. Mitchell*, Fla., 10 South. Rep. 562.

36. DEED — Acknowledgment — Deputy Clerk. — Act Aug. 8, 1870, authorized "clerks of the district courts, their deputies, and notaries public," to take acknowledgments. Act May 6, 1871, provided that acknowledgments "may be taken before some notary public, district clerk or judge," but contained no repealing clause: *Held* that, even after the passage of the latter act, an acknowledgment taken before a deputy clerk, and certified by him with his own name alone as such deputy, was good.—*Herndon v. Reed*, Tex., 18 S. W. Rep. 665.

37. DEED—Boundaries.—In a deed of conveyance the boundary lines of the granted premises, designated by courses and distances, starting from a definite place of beginning, disclosed no error or inconsistency until the last line was reached, which was to run "to the place of beginning;" but the given course and distance would not bring it to that point, nor complete the inclosure of any land: *Held*, that the course and distance of the last line should be rejected as erroneous, and effect be given to the more certain designation, "thence to the place of beginning."—*Owings v. Freeman*, Minn., 51 N. W. Rep. 476.

38. DITCH ASSESSMENTS—Appeal.—Though laws of Indiana provide that ditch assessments shall be made by the county surveyor, and appeals therefrom prosecuted against him, the county only is financially interested in the collection of the assessment, and is entitled to defend in the name of the county surveyor, or to employ attorneys to appear for the county surveyor and resist the appeal.—*Stingley v. Nichols, Sheperd & Co.*, Ind., 29 N. E. Rep. 34.

39. EJECTMENT.— In an action of ejectment by one claiming under a tax title against another in possession under a similar title, the fact that defendant failed to duly acquire title will not aid or strengthen the position of the plaintiff, who is similarly situated.—*Feagin v. Jones*, Ala., 10 South. Rep. 537.

40. EMINENT DOMAIN—Land for Park Purposes.—Under Local Acts 1889, No. 388, § 15, which provides that the park commissioners may acquire, by legal proceeding, "any land or interest in lands which may be found necessary for the opening of any park or enlargement or extension of any park or boulevard which may hereafter be laid out, located, or established," a right of way for a boulevard may be condemned across railroad tracks. — *Commissioners of Parks and Boulevards v. Michigan Cent. R. Co.*, Mich., 51 N. W. Rep. 447.

41. EMINENT DOMAIN—Land for Military Purposes.—The State may, in time of peace, condemn land in fee-simple, for its use as a military encampment for the military forces of the State.—*State v. Heppenheimer*, N. J., 23 Atl. Rep. 664.

42. EQUITY—Minors.—Where minors are to be made parties defendant in a suit in equity, subpœna should be issued to such minors, and regularly served upon them in the presence of their legal guardian, or in the presence of the person who has the present care and custody of them. Then a guardian *ad litem* for such minors should be appointed by an order of the court, and such guardian *ad litem* should also be served with subpœna in the cause.—*McDermott v. Thompson*, Fla., 10 South. Rep. 584.

43. EXECUTORS — Appointment of Debtor.—When a debtor is appointed executor of his creditor's will, equity will presume that the debt has been paid, and will treat it as an asset in the executor's hands.—*Crow v. Conant*, Mich., 51 N. W. Rep. 450.

44. EXECUTORS—Power to Sell.—While executors, under a power to sell real estate and invest the proceeds in safe or productive stocks or funds, have no authority to invest the proceeds in a leasehold, and would be liable for any loss arising therefrom, still, it having been bought with the funds of the estate, it would belong thereto, and could be disposed of by the executors in the same manner as any of the other personal estate.—*Seldner v. McCreery*, Md., 23 Atl. Rep. 641.

45. EXECUTORS AND ADMINISTRATORS—Fraudulent Conveyance.—An administrator cannot set aside, as fraudulent as to creditors, a deed executed by his intestate, and recorded before, but not delivered until after, her death.—*Rousseau v. Bleau*, N. Y., 30 N. E. Rep. 52.

46. FRANCHISE — Ferries and Turnpikes. — In the absence of express provisions in the charter of a turnpike and ferry company that no competing turnpike, ferry, or bridge shall be erected near by, a grant to a county of the right to construct a rival bridge and turnpike does not impair the obligation of a contract, though it totally destroys the value of the former grant.—*Hydes Ferry Turnpike Co. v. Davidson County*, Tenn., 18 S. W. Rep. 626.

47. FRAUDS, STATUTE OF. — Where plaintiff executed to defendant an absolute deed of certain land, and defendants orally agreed to grant him back a certain water privilege, right of way, and right to take fruit and grass, such privilege and rights are each an interest in the land, within the meaning of the statute of frauds.—*Morse v. Inhabitants of Wellesley*, Mass., 30 N. E. Rep. 77.

48. FRAUDS, STATUTE OF—Novation.—A novation is not a promise to pay the debt of another, with the statute of frauds, and need not be in writing. — *Blankenship & Blake Co. v. Tillman*, Tex., 18 S. W. Rep. 646.

49. FRAUDULENT CONVEYANCES. — One who gives a mortgage for the purpose of hindering and delaying creditor is not estopped to set up want of consideration as a defense to a proceeding by the mortgagee to enforce the mortgage, since the law will not aid either party to the transaction.—*Williams v. Clink*, Mich., 51 N. W. Rep. 453.

50. FRAUDULENT CONVEYANCES — Consideration. — A mortgage executed by a mother to her daughter to secure a *bona fide* loan, made by the daughter to the mother several years before the execution of the mortgage, is not fraudulent as to a creditor of the mother who had brought suit at the time the mortgage was given, notwithstanding the land covered by the mortgage is worth more than twice the amount of the mortgage debt, and it also appears that the mother wished to avoid paying the debt for which suit had been brought, but it does not appear that the daughter knew of this intention, or did anything more than was necessary to secure her claim. — *Bannister v. Phelps*, 51 N. W. Rep. 417.

51. FRAUDULENT CONVEYANCES—Subsequent Creditors. —A subsequent creditor cannot avoid a conveyance of his debtor merely because it was made with intent to defraud creditors existing at the time of its execution.— *Fullington v. Northwestern Breeders' Ass'n*, Minn., 51 N. W. Rep. 475.

52. FRAUDULENT MORTGAGE. — A mortgage otherwise pure is not rendered fraudulent by a provision in the same, added to a power of sale conferred upon the mortgagee to the effect that he is to hold the residue of the proceeds in excess of the mortgage debt subject to the order of the mortgagor. — *Coulter v Lumpkin*, Ga., 14 S. E. Rep. 614.

53. FRAUDULENT REPRESENTATIONS. — A false and fraudulent representation may be relied on by a person having no actual knowledge, although the fact in question is a matter of public record.—*Backer v. Pyne*, Ind., 30 N. E. Rep. 21.

54. GAMBLING CONTRACTS. — Though the contract for the future delivery of wheat, intended only as a speculation on the probable difference in price, no actual delivery being contemplated, is illegal as a gaming contract and not enforceable, yet a sum of money representing the margins deposited and the profits realized in the deal, paid over by one of the parties to the broker who negotiated the transaction, to be by him paid to the other, can be recovered in an action by the latter against the broker, on proof of such payment.— *Floyd v. Patterson*, Tex., 18 S. W. Rep. 654.

55. GUARDIAN AND WARD— Sale of Realty.—Code Civil Proc. Ky. § 490, authorizes a sale by proceedings in chancery of real estate owned jointly by two or more persons when the same cannot be divided without materially impairing its value, even though some of the owners are infants or of unsound mind: *Held*, that a sale thereunder of an infant's interest on application of its statutory guardian conveys an absolute title when the court finds that the requisite facts exist.— *Megibben's Adm'rs v. Perin*, U. S. C. C. (Ohio), 49 Fed. Rep. 183.

56. HIGHWAYS.—Under Rev. St. § 5035, which provides that a road used as a public highway for more than 20 years shall be deemed a public highway, a lane traveled by the public continuously for 40 years comes within the statute.—*Louisville, N. A. & C. Ry. Co. v. Etzler*, Ind., 30 N. E. Rep. 32.

57. HIGHWAY — Legislative Power — Railroads.— The dominant control of highways and streets is vested in the legislative power of the State, and, by virtue of legislative enactment, a railroad, operated either by steam or animal power, may be constructed across or along them without the consent of the municipal authorities.— *State v. Jacksonville St. R. Co.*, Fla., 10 South. Rep. 590.

58. HOMESTEAD—Dependent Female.—That one of the minor beneficiaries of a homestead taken by the head of a family in 1879 is, after arriving at full age, a dependent female will not extend the duration of the homestead estate beyond the death of the head of the family and his widow, and beyond the arrival at majority of all the children. — *Vornberg v. Owens*, Ga., 14 S. E. Rep. 562.

59. HUSBAND AND WIFE—Marriage Settlement.—A man with personalty of the value of $40,000 falsely represented to a woman whom he was about to marry, and over whom he had acquired complete influence, the effect of a marriage settlement by which she released all of her rights in his estate, and became entitled to receive therefrom the mere sum of $200. The man took the woman to his own legal adviser, who said the instrument was all right: *Held*, that the rule that the false representation of the legal effect of a written instrument will not entitle the person deceived to relief has no application here.— *Lamb v. Lamb*, Ind., 30 N. E. Rep. 36.

60. INJUNCTION. — Equity will not enjoin the enforcement of a decree obtained by fraud, mistake, or accident, unless the complainant shows that the same could not have been prevented by the use of reasonable diligence on his part, that the law afforded him no efficient defense against such decree, and that he has been diligent in seeking relief.—*Ratliff & Stretch*, Ind., 30 N. E. Rep. 30.

61. INJUNCTION — Venue.— A suit in equity to enjoin a railroad company from removing earth from plaintiff's lands is, "an action for an injury to real property," within Civil Code, § 81, providing that such "actions must be brought in the county in which the subject of the action, or some part thereof, is situated."—*Cox v. Little Rock & M. R. Co.*, Ark., 18 S. W. Rep. 630.

62. INSURANCE — Proofs of loss. —A failure to make proofs of loss within 30 days, as required by the terms of the policy, entirely bars an action thereon, in the absence of a waiver, when the policy expressly provides that a failure to comply with its conditions shall work a forfeiture. — *Gould v. Dwelling-House Ins. Co.*, Mich., 51 N. W. Rep. 455.

63. INTERSTATE COMMERCE COMMISSION — Finding of Facts.— The finding of facts in a report by the interstate commerce commission has no greater weight where the commission itself proceeds by petition under section 16, 24 St. at Large, p. 384, to enforce obedience to its orders, than where an individual aggrieved so proceeds, and is not conclusive evidence of such facts.— *Interstate Commerce Commission v. Lehigh Val. R. Co.*, U. S. C. C. (Pa.), 49 Fed. Rep. 177.

64. INTOXICATING LIQUORS — Illegal Sales — The evidence warranted the jury in finding that "root tonic" sold by the accused to the person mentioned in the bill of indictment was intoxicating, and that the same was sold within two years preceding the finding of the bill of indictment.—*Sanders v. State*, Ga., 14 S. E. Rep. 570.

65. INTOXICATING LIQURS—Pharmacists.—The fact that discretion is, by section 3067, given to county commissioners, in granting to pharmacists licenses for using intoxicating liquors in compounding prescriptions, does not render it unconstitutional, as depriving persons of property without due process of law.— *State v. Gray*, Conn., 23 Atl. Rep. 718.

66. INTOXICATING LIQUORS — Social Club. — A social club, having a back room partly disconnected from its parlors and fitted up with a sideboard from which drinks are sold by a salaried steward to members and visitors at a price fixed, under the laws of the club, by a "governing committee," is, if drinks are so sold without a license, or to a minor member, indictable under the law prohibiting unlicensed retailing, and sales to minors, and declaring that any person who shall directly or by any evasion or subterfuge violate any provisions of the act shall be liable to indictment.—*Nogales Club v. State*, Miss., 10 South. Rep. 574.

67. INTOXICATING LIQUORS—Sunday.—In 1857, although there was a general penal statute operative throughout the State, making it a misdemeanor to keep open a tippling house on the Sabbath day, there was nothing to inhibit the general assembly from passing a local statute for the city of Augusta, empowering the city council "to pass all ordinances in relation to keeping open tippling houses on the Sabbath day in said city." —*Hood v. Von Glahn*, Ga., 14 S. E. Rep. 564.

68. JUDGE—Disqualification—Quo Warranto.—A judge who, while at the bar, was a member of a firm upon whose advice proceedings were had to incorporate a city, is not qualified to decide a *quo warranto* proceeding brought to dissolve the corporation on the ground of alleged illegality in the incorporation proceedings.—*State v. Burks*, Tex., 18 S. W. Rep. 662.

69. JUDGMENT AGAINST TWO DEFENDANTS. — Where two defendants are sued jointly for malicious prosecution, and judgment is rendered against them, but one defendant obtains a new trial, a judgment for a less amount may be rendered against him, while the former judgment remains in force against the other.—*Dawson v. Schloss*, Cal., 29 Pac. Rep. 31.

70. JUSTICE OF THE PEACE— Malicious Prosecution.—An action for wrongfully suing out an attachment, under which the property of the debtor was seized, is one for malicious prosecution, and a justice of the peace has no jurisdiction.—*Rice v. Day*, Neb., 51 N. W. Rep. 464.

71. LANDLORD AND TENANT — Dangerous Premises.—In an action for injuries caused by plaintiff's falling through a hole in the floor of a building owned by defendants, it appeared that the building was occupied by a tenant who had manufactured some bakers' troughs for plaintiff's employer, and that plaintiff was removing the troughs when the accident occurred. The hole was used for passing boards and other material from that floor to another. It was not covered or protected in any way when plaintiff fell through it: *Held*, that defendants were not liable; the fault, if any, being that of the tenant.—*Cadwell v. Slade*, Mass., 30 N. E. Rep. 87.

72. LIBEL — Pleading. — In an action for libel, where the article complained of was naturally susceptible of the construction given by the innuendoes, and its truth is denied in the complaint, a general demurrer was properly overruled. — *Democrat Pub. Co. v. Jones*, Tex., 18 S. W. Rep. 652.

73. MANDAMUS— Pleading.— In an action of *mandamus* the petition is no part of the writ, which latter serves the same purpose as the complaint in other actions, and must state all the material facts, and show a clear right to the relief demanded, under Code, §§ 596, 598; and upon the return thereof defendant may demur or answer thereto in the same manner as to a complaint in an action.—*Elliott v. Oliver*, Oreg., 29 Pac. Rep. 1.

74. MASTER AND SERVANT — Risks of Employment.—An injury to a railway brakeman while engaged in coupling cars, caused by a co-employee, having charge of an engine, backing it up against cars standing on a siding, with such force as to drive them back upon one of the cars which the brakeman was coupling, is within the risks incident to his employment.—*Berrigan v. New York, L. E. & W. R. Co.*, N. Y., 30 N. E. Rep. 57.

75. MECHANICS' LIEN. — The mechanic's lien law, as amended in 1874, construed as giving a right of lien, not only to subcontractors for the construction of a railway, but to subcontractors in the second degree.—*Spafford v. Duluth, R. W. & S. R. Co.*, Minn., 51 N. W. Rep. 469.

76. MECHANICS' LIEN—Notice. — The effect of a notice under the third section of the mechanic,s lien law (Revision, 668) is to work an assignment *pro tanto* of that which is due or to become due from the owner to the contractor from the time of the service of the notice. — *Anderson v. Huff*, N. J., 23 Atl. Rep. 654.

77. MINING LANDS — Ejectment.—Since Rev. St. U. S. § 2258, reserves from pre-emption all "lands on which are located any known salines or mines," in ejectment by one claiming under a pre-emption entry, defendant may show that, at the time of final proof, there were known to exist gold and silver mines located and worked prior thereto.—*Kansas City Mining & Milling Co. v. Clay*, Ariz., 29 Pac. Rep. 9.

78. MORTGAGE—Foreclosure.—A purchaser of land under statutory foreclosure of mortgage can recover rent from a lessee of the owner as fast as the rent falls due under the lease, and payment by such lessee, to his lessor after notice of the purchaser's rights is no defense.—*Clement v. Shipley*, N. Dak., 51 N. W. Rep. 414.

79. MORTGAGE — Foreclosure. — To a bill filed to foreclose a mortgage for purchase money due on real estate, the mortgagor in undisturbed possession, under a warranty deed from the mortgagee with covenant that said real estate is not incumbered by any mortgage, judgment, or any lien whatever, cannot set up as a defense an outstanding incumbrance or title, in the absence of any allegation of an eviction, actual or constructive, from the premises, or fraud or insolvency on the part of the mortgagee.—*Adams v. Fry*, Fla., 10 South. Rep. 559.

80. MUNICIPAL CORPORATION—Contract.—A city passed an ordinance authorizing a certain firm to construct water works for it upon terms fully set out. This was accepted by the firm, and a memorandum of the acceptance was attached to a copy of the ordinance, and signed in behalf of the city by the mayor and clerk thereof, under its corporate seal, and by the firm and each member thereof under their individual seals: *Held*, that this constituted a binding contract.—*City of Goldsboro v. Moffett*, U. S. C. C. (N. Car.), 49 Fed. Rep. 213.

81. MUNICIPAL CORPORATIONS—Ordinance—Change of Grade. — The power to alter the grade of a street implies the power to make only such incidental changes in the grade of intersecting streets as are necessary to adjust the grade of such streets to the changed grade of the principal street. — *State v. Mayor, etc.*, N. J., 23 Atl. Rep. 648.

82. NATIONAL BANK—Usury.— Rev. St. U. S. § 5198, provides that, if a national bank knowingly takes a greater rate of interest than is allowed by the State where the bank is situated, it shall be deemed a forfeiture of the entire interest which the notes carry with them, or which has been agreed to be paid thereon; and, in case a greater rate of interest has been paid, the person by whom it was paid, or his legal representatives, may recover back in an action of debt twice the amount of interest thus paid, provided the action is commenced within two years from the time of the usurious transaction: *Held*, that the statute does not apply to notes which have been canceled by renewal, whereby what was before interest has become interest-bearing principal. — *Brown v. Marion Nat. Bank*, Ky., 18 S. W. Rep. 635.

83. NEGLIGENCE—Land-owners- Removal of Support.—A complaint for damages for caving in of plaintiff's premises, resulting from defendant's excavation on an adjacent lot, which sufficiently avers the negligence, carelessness, and unskilful workmanship of defendant, is not bad for a failure to aver that plaintiff had no notice of defendant's intention to excavate. — *Block v. Hazeltine*, Ind., 29 N. E. Rep. 937.

84. NEGOTIABLE INSTRUMENTS — Consideration.—The withdrawal of a suit against a son is a sufficient consideration for a note given by the father.—*Mascolo v. Montesanto*, Conn., 23 Atl. Rep. 714

85. NEGOTIABLE INSTRUMENTS—Exchange of Notes.—The transfer and delivery of a promissory note by the payee to the maker of another note, in exchange therefor, is a valuable consideration for the latter; and there is no failure of consideration, although the former note subsequently becomes worthless. — *Rice v. Grange*, N. Y., 30 N. E. Rep. 46.

86. NEGOTIABLE INSTRUMENT—Unsigned Notice of Protest.—An unsigned notice of demand and non payment, sent by a notary to the indorser of a note, is insufficient as notice.— *People's Nat. Bank v. Dibrell*, Tenn., 18 S. W. Rep. 626.

87. PARTNERSHIP ACCOUNTING. — On a bill filed for an account by two members of a firm against one, the fact that one of the partners has the assets which once belonged to the firm in his possession will not cast the burden of showing that they still belonged to the firm upon the firm. — *Maps v. Slocum*, N. J., 23 Atl. Rep. 615.

88. PAYMENT—Check as Receipt.—Where, in an action by a broker to recover commissions, defendant intro-

duces a check alleged by him to have been received by plaintiff in full payment, plaintiff may show by parol that the check was intended only to pay his expenses. *Hendricks v. Leopold*, Tex., 18 S. W. Rep. 638.

89. PLEADING—Abatement.—An agreement, after suit is brought, to extend the time of payment of an indebtedness, cannot be pleaded as a bar to the action.—*Foster v. Daily*, Ind., 30 N. E. Rep 4.

90. PLEADING—Joinder. — The first count of a complaint was for killing an ox, the second for killing a horse, and in the claim of damages therefor was included freight paid on the horse to defendant, a railroad company: *Held*, that the claim for freight arose *ex delicto*, and that the causes of action were not improperly joined.—*Rideout v. Milwaukee, etc. Ry. Co.*, Wis., 51 N. W. Rep. 439.

91. PRINCIPAL AND AGENT—Silence as Ratification.—The silence of one for whom another volunteers to act does not amount to ratification, unless it appears that he was made acquainted with all of the facts and circumstances connected with the transaction, and also with his rights.—*Dugan v. Lyman*, N. J., 23 Atl. Rep. 657

92. PRINCIPAL AND SURETY—Discharge of Surety.—A bond by a principal and sureties, conditioned on the faithful performance by the principal of his duties under a contract of employment is a contract of suretyship, and not of guaranty; and a request by one surety to withdraw his name, made after delivery of the bond and after notice by the employer to the employee to enter upon the discharge of his duties, which request is not assented to by the employer, will not operate as a release of the surety making the request, or of the others, who became sureties on condition that he should join with them.—*Saint v. Wheeler & Wilson Manuf'g Co.*, Ala., 10 South. Rep. 539.

93. PRINCIPAL AND SURETY—Mortgage to Indemnify Surety.—A deed by a defaulting State treasurer of all his property, in trust to indemnify the sureties on his bond is valid, and takes precedence of any lien the State may subsequently acquire by judgment against him.—*State v. Hemingway*, Miss., 10 South. Rep. 575.

94. PROCESS—Amendment.—Process properly annexed to the declaration is not void because in stating the case it misdescribes it by inserting a name as plaintiff different from the name of the plaintiff in the action as shown by the declaration. Such misdescription is amendable at any time, either before or after judgment.—*Scudder v. Massengill*, Ga., 14 S. E. Rep. 571.

96. RAILROAD COMPANIES—Accident at Crossing.—In an action against a railroad company to recover damages for personal injuries at defendants' crossing, the court instructed the jury that it was defendants' duty to exercise a "high degree of care" in approaching the crossing: *Held*, the court having explained to the jury what amount of care was required, that they could not be misled by the instruction.—*Ohio & M. R. Co. v. Buck* Ind., 30 N. E. Rep. 19.

96. RAILROAD COMPANIES—Defective Railroad Track.—A complaint for personal injuries to an employee of defendant's construction train, which avers in substance that the injury resulted, without any fault of plaintiff, from the careless and unskillful construction of defendant's railroad, the condition of which defendant knew, but plaintiff had no means of knowing, not having been over that part of the road before the accident, states a cause of action.—*Evansville & R. R. Co. v. Doan*, Ind., 29 N. E. Rep. 940.

97. RAILROAD COMPANIES—Killing Stock.—In an action against a railroad company for the killing of a mare by one of its trains, where the mare was running at large, an instruction that it was the engineer's duty to ring the bell, and blow the whistle, and reverse the engine, and do everything in his power, in the ordinary discharge of his duty, to save the animal's life, is erroneous.—*Kansas City, M. & B. R. Co. v. Cantrell*, Miss., 10 South. Rep. 580.

98. RAILROAD COMPANIES—Negligence.—It is actionable negligence for a railroad company to so construct a side track that, when cars are standing thereon, freight trains cannot pass on the main line without endangering the lives of brakemen engaged in the discharge of their duties; and the fact that a car causing death, under such circumstances, was left upon the side track by co-servants, is immaterial.—*Pennsylvania Co. v. McCormack*, Ind., 30 N. E. Rep. 27.

99. RAILROAD COMPANIES—Tickets.—Where a passenger who has gone to a railroad ticket office to purchase his ticket in ample time to do so is unable to buy a ticket, and is compelled to go on the train without one because, although the ticket office is open, as required by Sayles' Rev. St. art. 4258*b*, § 9, there is no one in the office to sell tickets, the agent being busy unloading baggage, such passenger has a right to travel on the train without paying the additional fare allowed by statute to be exacted from passengers without tickets.—*Fordyce v. Manuel*, Tex., 18 S. W. Rep. 657.

100. RAILROAD COMPANIES — Trespassers — License.—Evidence that persons living near a part of a railroad track remote from any station had been in the habit of traveling on the track; that the engineer had seen persons walking on that part of the track but not more frequent than on other parts of the track similarly situated; and that no measures had been taken to prevent such use of the track is not sufficient to establish a license to the public to use the track.—*Missouri Pac. Ry. Co. v. Brown*, Tex., 18 S. W. Rep. 670.

101. REPLEVIN — Transfer of Property.—A person in possession of goods without right cannot avoid an action of replevin by transferring the possession to another, even though the transfer be made before the commencement of the suit.—*Helman v. Withers*, Ind., 30 N. E. Rep. 5.

102. RES JUDICATA.—Where plaintiff is required by the court to make an election whether he will proceed in his action at law or suit in equity, and thereupon he elects to proceed in equity, and discontinues the action at law, and afterwards a decree is entered dismissing the bill "without prejudice," the discontinuance of the action at law is not a bar to a subsequent action.—*Reynolds v. Hennessy*, R. I., 23 Atl. Rep. 639.

103. SALE.—Where, before maturity, the merchantable peaches on certain trees are sold at a given price per bushel, the gathering to be done by the purchaser, and where, during the gathering time, the seller consents and agrees with the buyer that all the peaches left on a portion of the trees are not merchantable, and the buyer abstains from gathering them, he cannot be compelled to pay for them, whether they were merchantable or not.—*Houser v. Gurr*, Ga., 14 S. E. Rep. 594.

104. SALE—Vendor's Lien.—Delivery of goods sold upon condition that they shall be paid for concurrently with the delivery raises a presumption that the sale is absolute, and if the payment be not made as agreed the vendor must pursue his right to recover possession of the goods with all the reasonable diligence that the circumstances surrounding will permit.—*Leatherbury v. Connor*, N. J., 23 Atl. Rep. 684.

105. SALE—Warranty.—Where, in a suit for damages for the bursting of a boiler sold by defendant to plaintiff, the jury find specially that defendant recommended the boiler as fit and suitable for plaintiff's purposes, and that it was not fit and suitable, but do not find that the bursting was due to any defect covered by the warranty, a judgment for defendant on the verdict will not be reversed on an appeal from the judgment alone; the evidence not being brought up by bill of exceptions.—*Barnes v. Burns*, Wis., 51 N. W. Rep. 419.

106. SHERIFF—Negligence.—The fact that plaintiff in attachment selects a person, and has the sheriff appoint him his deputy to levy the attachment, is not such interference with the sheriff as will release him from liability for the negligence as such deputy resulting in the destruction of the goods by fire after they have been levied on.—*State v. Dalton*, Miss., 10 South. Rep. 578.

107. SLANDER—Privileged Communications. — Where

the jury finds specially that the words were not spoken "in the proper place and manner," the words cannot be held to be privileged.—*Karger v. Rich*, Wis., 51 N. W. Rep. 424.

108. SPECIFIC PERFORMANCE—Compromise—Fraud.—Where, in order to compose a bitter family quarrel over their father's estate and "get the property out of the lawyers," the sons and daughters of a testator sign an agreement to dismiss the litigation, disregard the will, and divide equally among them all that is left of their father's property, such agreement will be specifically enforced unless there is very clear evidence of of fraud or imposition in procuring it.—*Chandler v. Pomeroy*, U. S. C., 12 S. C. Rep. 410.

109. SPECIFIC PERFORMANCE—Insurance.—Where insured property is burned on the day that the policy expires, and the assured, without disclosing the fact of the loss, sends the policy to the company for the purpose of procuring an indorsement showing a renewal, a court of equity will not enforce the delivery of the policy.—*Dodd v. Home Mut. Ins. Co.*, Oreg., 29 Pac. Rep. 3.

110. STATUTE—Repeal by Implication.—An express repealer of inconsistent general laws will not warrant an inference that inconsistent special laws are not to be repealed, when such an inference would render the repealing act unconstitutional.—*State v. Collector of Harrington Tp.*, N. J., 23 Atl. Rep. 668.

111. SUBROGATION.—On foreclosure of a chattel mortgage, intervener, who was a junior mortgagee, and had paid to plaintiff a part of the claim secured by his mortgage, was not entitled, by virtue of such payment in the absence of conduct creating an estoppel against plaintiff, to a decree placing him upon an equal footing with plaintiff in the distribution of the proceeds of the mortgaged property.—*Cason v. Westfall*, Tex., 18 S. W. Rep. 668.

112. TAXATION — Exemptions. — Act March 9, 1882, entitled "An act to encourage the establishment of factories in this State, and to exempt them from taxation," and (section 1) declaring exempt taxation for 10 years the machinery used for the manufacture of cotton or woolen goods, yarns or fabrics composed of these or other materials, or for the making of all kinds of machinery or implements of husbandry, "or all other things or articles not prohibited by law," exempts only machinery used for making articles of like character with the articles enumerated, and does not exempt ice factories.—*Greenville Ice & Coal Co. v. City of Greenville*, Miss., 10 South. Rep. 574.

113. TAXATION — Insolvent Insurance Company.—Receivers of an insolvent mutual life insurance company, having funds of the insolvent in their hands awaiting an order of the court for distribution, are not the owners thereof, within the meaning of Gen. St. § 3802, which requires all persons liable to taxation to bring in lists of taxable property belonging to them.—*Brooks v. Town of Hartford*, Conn., 23 Atl. Rep. 697.

114. TAXATION — Ordinance — License. — Acts 1886, 87, 247, giving the city council of Mobile power to assess a license tax upon all persons carrying on "any business, trade, or profession" within the city, authorizes the assessment of a tax for retailing cigars; although the cigars are sold in connection with a grocery business, and the grocer has taken out a general license for such business.—*City of Mobile v. Craft*, Ala., 10 South. Rep. 534.

115. TAXATION OF CORPORATION—Interstate Commerce.—The federal constitution will not invalidate a State tax upon a corporation merely because the corporation has power to engage in foreign or interstate commerce; the corporation must be actually engaged in such commerce to secure the immunity.—*Honduras Commercial Co. v. State Board of Assessors*, N. J., 23 Atl. Rep. 668.

116. TAX-DEEDS — Confirmation. — Manst. Dig. § 581, provides that a decree of the court confirming a tax-sale shall vest a perfect title in the purchaser, and operate as a complete bar against any person claiming in consequence of an informality or illegality in the proceedings: *Held*, that a decree under this section confirming a commissioner's deed is conclusive, though the property embraced in such deed was not advertised as delinquent.—*Caldwell v. Martin*, Ark., 18 S. W. Rep. 633.

117. TOWNS—Selectmen — Reward.—In the absence of special authority and intent to bind the town, and offer in writing to pay a reward of $2,500 to "any person furnishing evidence that will lead to the arrest and conviction of the person who shot" one C, signed by the selectmen of the town, as such, will bind the signers personally, as Pub. St. ch. 212, § 12, only authorizes the selectmen to pay $500 as such reward.—*Brown v. Bradlee*, Mass., 30 N. E. Rep. 85.

118. TRIAL—Federal Court — Opinion on Evidence.—It is not error for a federal judge to express his opinion as to the weight which ought to be given to the statement of a witness, when the jury is in fact left free to discredit the statement.—*Atchison, T. & S. F. R. Co. v. Howard*, U. S. C. C. of App., 49 Fed. Rep. 206.

119. TRUST—Power to Revoke—Bank Deposit.—Defendant deposited money in a bank to the credit of himself as "trustee for G children." He testified that he deposited the money from time to time for the last 10 or 15 years as a gift to those children: *Held*, that the trust was irrevocable, nothing remaining in defendant but the naked legal title.—*Sayre v. Weil*, Ala., 10 South. Rep. 546.

120. TRUSTS—Validity of Deed.—A finding in favor of the validity of a deed executed two days before the grantor's death, and purporting to convey presently all of the grantor's property upon certain trusts, previously expressed, will not be disturbed on appeal although the trusts were somewhat testamentary in semblance, providing, among other things, for the payment of the grantor's debts, and for gifts to take effect after her death.—*Bromley v. Mitchell*, Mass., 30 N. E. Rep. 83.

121. TRUSTEES—Investments.—Under the provision of a will empowering trustees to sell any part of the residuary estate if in their judgment the interests of the legatees would be promoted thereby, and to invest the proceeds in other property, the responsibility of the trustees in making any investments will be that usually attaching to trustees.—*Clark v Beers*, Conn., 23 Atl. Rep. 717.

122. UNITED STATES SUPREME COURT—Circuit Court of Appeals.—The discretion vested in the supreme court to review the decisions of the circuit court of appeals by *certiorari* (Act Cong. March 3, 1891, § 6) will only be exercised, in matters of gravity and general importance; and a question as to whether, in an action for personal injuries, a judgment of dismissal, at the conclusion of plaintiff's evidence, is a bar, under the Minnesota law, to another suit on the same cause of action, or whether, in such an action, the law in respect to the recovery of a servant against his master was properly applied to the special facts disclosed by the evidence, is not of a character to call for the exercise of such discretion.—*In re Woods*, U. S. C. C., 12 S. C. Rep. 17.

123. VENDOR AND VENDEE—Notice.—Where a person, after purchasing land, resells a part to the vendor upon an independent consideration, the transaction having no relation whatever to the purchaser's rights as vendor in the original sale, the possession of the vendor of the part resold is not notice to a mortgagee of any lien upon the balance.—*Hodges v. Winston*, Ala., 10 South. Rep. 535.

124. WATER-RIGHTS — Appropriation. — The prior appropriator of water for irrigation purposes is entitled to the water so appropriated, necessary to the proper irrigation of his land, as against subsequent locators.—*Kirk v. Bartholomew*, Idaho, 29 Pac. Rep. 40.

125. WILLS—Bequest in Trust.—A bequest to an executor, for uses and purposes stated, which cannot be carried out, is an attempt to create a trust, and cannot operate as an unconditional gift to the executor.—*In re Ingersoll's Will*, N. Y., 30 N. E. Rep 47.

ABSTRACTS OF DECISIONS OF THE MISSOURI COURTS OF APPEAL.

ST. LOUIS COURT OF APPEALS.

APPEAL — Amount in Controversy—Jurisdiction —1. Where the defendant was a smelter and refiner of ores and used the railroad switch in controversy for hauling the ores it treated, and it appeared that the switch was of great importance to defendant in its business, which was very extensive; that its output is from two to three hundred thousand dollars a month in silver and from seven to eight thousand dollars a day, the court held that the deprivation of the use of the switch would subject the defendant to a financial loss greatly in excess of $2,500 and that the appeal must be transferred to the supreme court. 2. Questions of disputed boundary are not questions involving the title to real estate so as to deprive the court of appeals of jurisdiction.—*Evans v. Howard F. B. Co. v. St. Louis Smelting Ref. Co.*

APPEAL — Amount in Controversy — Jurisdiction.—Where the right of appeal depends on the value in dispute, such value must be estimated in money. Where the object of a suit is not a money judgment but other relief, the amount involved must be determined by the value of the relief to the plaintiff, and the value of the loss to the defendant in money should the relief be granted, or *vice versa* should the relief be denied. A suit to restrain defendant from conducting smelting and refining works, where it appeared that the aggregate cost of the plant was $400,000, which a perpetual injunction would reduce to a nominal value; that a fume condenser, such as plaintiff claims would obviate the evils complained of, would cost $80,000, that any condenser likely to obviate such evil would be between $12,000 and $15,000, exclusive of losses by interruption of business, involves more than $2,500 and must be transferred to the supreme court.—*Evans v. Howard F. B. St. Louis Smelting & Ref. Co.*

APPEAL FROM JUSTICE—Affirmance — Discretion.—In the case of a failure to prosecute an appeal from a justice of the peace by payment to the clerk of the filing fee required by statute, the exercise of the power of the circuit court to vacate or affirm, addresses to the discretion of the court and is subject to review when the discretion is plainly abused. Where it appeared that the defendant, a railroad company, had a running account with the clerk and an understanding that every appeal by it should be docketed and the fee paid by debiting it on the account, it was not an abuse of the discretion to set aside an affirmance procured by plaintiff and reinstate the case. Affirmed.—*Johnson v. St. Louis, etc. Ry. Co.*

APPEAL FROM PROBATE COURT—Bond.—1. The filing of an affidavit and bond in the probate court are conditions precedent to the granting of an appeal to any claimant without which the court has no jurisdiction of the appeal. After the case is in the circuit court the action of that court in permitting a new bond to be filed will not invest it with jurisdiction of the appeal, if no land was given the probate court in conformity with the statute. 2. An instrument which does not recite that it is a bond or that it purports to be attested by a seal, and which has no seal or scroll set opposite to the names of the signers, cannot be construed to be a bond on any theory. Reversed and Remanded.—*Corbin v. Lovell.*

CITY ORDINANCE—Adjoining Proprietors—Action between Individuals.—A city ordinance providing that the walls of a business house which rest upon the line of the lot, and the foundation of which do not extend fifteen feet to the bottom of the footings shall be underpinned, sustained and protected at the entire charge and cost of the owner, when the adjoining land-owner wishes to build and sink his cellar or walls to a greater depth, does not enforce a duty imposed by general law and cannot be made the foundation of an action between individuals so as to enable the adjoining land-owner to recover the expense and cost of shoring and underpinning the walls made necessary by the neglect of the owner of the building to comply with the ordinance. Affirmed.—*Eads v. Gains.*

KANSAS CITY COURT OF APPEALS.

MARRIED WOMAN—Action by Wife Against Husband—Separate Estate. — In a suit in equity by a wife, living apart from her husband, against the husband, for recovery of her personal property in possession of husband: *Held*, Sec. 6869, R. S. 1889, divests the husband of all interest in the property of the wife described therein, and places it under her sole control; the husband's use and care of such property is permissive, in the nature of an agency. It becomes her separate estate by force of the statute, and an intention to that effect on part of the donor need not appear, neither Sec. 1996, R. S. 1889, providing that a married woman may, in her own name, with or without joining her husband as a party, sue and be sued, in any courts of this State having jurisdiction, with the same force and effect as if she were a *feme sole*, etc., nor Sec. 6864, providing that a married woman shall be deemed a *feme sole* so far as to enable her to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for or against her, and may sue and be sued at law or in equity, with or without her husband being joined as a party, etc., authorize her to sue her husband at law.—*Ilgenfritz v. Ilgenfritz.*

MORTGAGE—Release of.—Under Secs. 7094 and 7095, R. S. 1889, which provide that, when the mortgagee receives full satisfaction of this mortgage debt, he shall, at the request and *cost* of the mortgagor acknowledge satisfaction of the mortgage, either by indorsing satisfaction on the margin of the record, or by delivering a sufficient deed of release to the mortgagor, the "*costs*" that shall be paid or tendered by the mortgagor includes only the fees necessary to be paid the recorder for entering satisfaction on the record, or the cost of executing and delivering a deed of release, and not compensation to mortgagee for loss of time, or traveling expenses.—*Dodson v. Clark.*

MUNICIPAL AUTHORITIES—Discretionary Power—Abutting Property. — In suit on special tax bill: *Held*, that under an ordinance requiring the contract to be let to the "lowest responsible bidder," the council has the power to let the contract to one not the lowest bidder. In such cases the duty of the city authorities is not wholly ministerial. It partakes sufficiently of a discretionary or judicial character, in the absence of fraud or misconduct, to render their decision binding. Where part has been sold off of the lot which abuts the improvement, and such part fronts on another street, the improvement must be charged against that part, only of that property which abuts on the street improved at the time the lien attaches, regardless of the original depth of the lot.—*Clopton v. Taylor.*

MUNICIPAL CORPORATION— Powers.—In an action for damages to gas-mains and service pipes: *Held*, the provision in an ordinance for the construction of a public sewer, that the contractor shall be liable for all injuries to water and gas-pipes and other structures met with in the prosecution of the work, for damages to public and private property, resulting therefrom, and shall assume all responsibility for loss and damage or injury, to persons or property, arising out of the nature of the work, from the action of the elements, or from unseen or unusual difficulties, is not within the chartered grants of power to the City of Sedalia, and so far as it provides indemnity and payment of the same to the plaintiff, through the defendant, as contractor, out of funds arising from the sewer tax, is invalid.—*Sedalia Gas-light Co. v. Mercer.*

WARRANTY—Patent Defects.—In a suit for damages for breach of warranty of a horse, *held*, that a general warranty of soundness does not cover patent defects, nor defects known to the buyer. Yet, the rule is equally well settled that a vendor may, in express terms, warrant against an obvious defect. It is a matter of contract, and in construing it the object is to discover the real intention of the parties.—*Samuels v. Bortee, Adm'r.*